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v. 2470
No. 11625

see vol. 2469
United States

Circuit Court of Appeals

For the Ninth Circuit.

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, Evelyn Hamburger, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

In Two Volumes

VOLUME II

Pages 313 to 507

Upon Petition to Review a Decision of the Tax Court
of the United States

No. 11625

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Upon Petition to Review a Decision of the Tax Court
of the United States

RESPONDENT'S EXHIBIT A

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 115120

In the Matter of the Estate
of

M. A. HAMBURGER,
Deceased.

ORDER AND DECREE SETTLING FINAL AC-
COUNT AND FOR DISTRIBUTION

D. A. Hamburger, as Executor of the Last Will and Testament of Moses Asher Hamburger, whose name is generally written M. A. Hamburger and sometimes written Moses A. Hamburger, deceased, having filed in this Court his duly verified Final Account and Report as such Executor, and a Supplemental Account, duly verified, and having filed with said Final Account and Report his Petition praying for distribution of the estate of said deceased, and said Final Account and Report, said Supplemental Account, and said Petition for Distribution coming on regularly to be heard on this 4th day of October, 1935, said Executor appearing by his attorneys, Messrs. Mitchell, Silberberg & Knupp, Belle Alice Nathan appearing by her attorneys, Messrs. Newlin & Ashburn, Evelyn Hamburger and Jennie H. Marx appearing by their attorneys, Messrs. Finlayson, Bennett & Morrow, and Florence Hamburger Bryant, Arthur M. Ham-

Respondent's Exhibit A—(Continued)

burger and Howard Hamburger appearing by their attorney, Frederick C. Bryan, Esq., and witnesses having been sworn and examined, and evidence in support of said Account and said Petition for Distribution having been heard and considered;

And it now appearing to the satisfaction of the Court, the Court now finds: that notice of the time and place fixed for the hearing of said Final Account and Report and said Petition for Distribution have been given in all respects for the time, to the persons, and in the manner required by law; that no written objections to said Final Account and Report, to said Supplemental Account, or to said Petition for Distribution have been filed herein, and that at the time of said hearing no person objected thereto, or opposed the distribution of the estate in the manner prayed for in said Petition for Distribution; that said Final Account and Report and said Supplemental Account are in all respects full, true and correct and that said Executor has correctly reported and fully accounted [342] for all property and all receipts of the estate of said deceased coming into his hands and that each and all of the disbursements made by said Executor are proper charges against the estate of said deceased and that in and by the schedule attached to said Final Account as Schedule "E," and in and by the schedule attached to the Supplemental Account as Exhibit "C," said Executor has correctly apportioned and segregated, as between principal and income, all the receipts and disbursements of said

Respondent's Exhibit A—(Continued)

Executor and has therein and thereby correctly set forth the total amount of net income in the hands of the Executor for distribution to the Trustee for the benefit of the persons hereinafter named accruing during the administration of said estate to this date.

And the Court further finds that each and all of the allegations contained in the Petition for Distribution on file herein are true.

Wherefore, It Is Ordered, Adjudged and Decreed that the Final Account and Report of said Executor and the Supplemental Account of said Executor should be, and each thereof is, hereby settled, approved, allowed and confirmed as filed.

It Is Further Ordered, Adjudged and Decreed that notice to creditors of the Estate of said deceased has been given in all respects for the time and in the manner required by law; that all claims against the estate of said deceased presented to said executor, on file in this Court, have been fully paid and satisfied, excepting only the claim of W. E. Chamberlain and Eleanor G. Chamberlain, the claim of Alexina Beam, and the amount due A. Hamburger & Sons, Inc., for money loaned to the Executor and that each and all of said persons have agreed upon the terms and conditions hereinafter set forth that distribution of the estate of said deceased might be made, without payment of said claims and obligations prior to distribution; that all inheritance taxes due to the State of California or to the United States of America, all local, municipi-

Respondent's Exhibit A—(Continued)

pal [343] or county taxes against any property belonging to the estate of said decedent, and all costs, charges and expenses of administration have been fully paid and discharged and that said estate is now in condition to be distributed to the persons entitled thereto under the terms of the Last Will and Testament of said deceased. That all taxes imposed upon said Executor under the provisions of the "Personal Income Tax Act of 1935" which have become payable have been paid and that no other taxes imposed under said Act will become payable from said Executor. That the deceased died testate and that the Last Will and Testament of said deceased, bearing date the 18th day of August, 1930, was admitted to probate by order of this Court duly and regularly made and entered on the 1st day of December, 1930, and that the order admitting said will to probate has become final. That the petitioner herein is the duly appointed, qualified and acting Executor of the Last Will and Testament of said deceased. That the names, ages and places of residence of the legatees and devisees named in said Will are as follows, to wit:

Names	Places of Residence	Relationship
David A. Hamburger	2401 N. Vermont Ave., Los Angeles, California	Brother
Belle Alice Nathan	505 S. Windsor Blvd., Los Angeles, California	Sister
Evelyn Hamburger	9514 Wilshire Blvd., Beverly Hills, California	Sister
Jennie H. Marx	9514 Wilshire Blvd., Beverly Hills, California	Sister

Respondent's Exhibit A—(Continued)

Names	Places of Residence	Relationship
Florence Hamburger Bryan	355 S. Rossmore, Los Angeles, California	Niece
Arthur M. Hamburger	2401 North Vermont Ave., Los Angeles, California	Nephew

(All of the foregoing persons being over the age of majority)

Howard Hamburger (Aged 15 years)	2401 North Vermont Ave., Los Angeles, California	Nephew
Farmers & Merchants National Bank	Fourth and Main Streets, Los Angeles, California	.....

That the names, ages and places of residence of the next of kin and heirs at law of said deceased are as follows: [344]

Names	Places of Residence	Relationship
David A. Hamburger	2401 N. Vermont Ave., Los Angeles, California	Brother
Belle Alice Nathan	505 S. Windsor Boulevard Los Angeles, California	Sister
Evelyn Hamburger	9514 Wilshire Boulevard Beverly Hills, California	Sister
Jennie H. Marx	9514 Wilshire Boulevard Beverly Hills, California	Sister

(All of the above named persons being over the age of majority)

It Is Further Ordered, Adjudged and Decreed that all the rest, residue and remainder of the estate of said testator in the hands of said Executor for distribution, hereinafter particularly described and set forth should be, and the same is hereby, distributed as follows, to wit:

To David A. Hamburger, as Trustee, the whole thereof, to have and to hold the same upon the following trusts, to wit:

(a) To apportion the said trust estate (but with-

Respondent's Exhibit A—(Continued)

out making any physical segregation or division thereof, except if and when and to the extent required to make distribution as hereinafter provided) into two (2) trust funds or portions, the one to be known as Trust Fund A, consisting of one-fourth ($\frac{1}{4}$ th) of said trust estate, and the other to be known as Trust Fund B, consisting of three-fourths ($\frac{3}{4}$ ths) of said trust estate;

(b) To pay and distribute the entire net income of Trust Fund A to David A. Hamburger, brother of said testator, at convenient times and, subject to instructions of this Court, at least annually during the term of his natural life;

(c) To pay and distribute the entire net income of Trust Fund B, at convenient times and, subject to instructions of this Court, at least annually, to Belle Alice Nathan, Evelyn Hamburger and Jennie H. Marx, sisters of said testator, or the survivor or survivors of them in equal shares during their respective lives; [345]

(d) In the event said David A. Hamburger shall die prior to the last survivor of said sisters of said testator, then and in that event, but only in such event Trust Fund A shall be merged in and become a part of Trust Fund B, and the entire trust estate shall thereafter be held, paid, and distributed as hereinbefore and hereinafter provided for said Trust Fund B;

(e) In the event that said David A. Hamburger shall outlive the last survivor of the said sisters of said testator, then and in that event from and after

Respondent's Exhibit A—(Continued)

the death of said David A. Hamburger, said trustee shall pay and distribute the net income of said Trust Fund A to Florence Hamburger Bryan, described in the Will of said testator as Florence Hamburger, niece of said testator, and daughter of said David A. Hamburger, and to Arthur M. Hamburger and Howard Hamburger, nephews of said testator and sons of said David A. Hamburger until they respectively shall attain the age of forty-five years. If at the death of the last survivor of said sisters and said brother of said testator, any one or more of said children of David A. Hamburger shall have attained the age of forty-five years, the trustee shall distribute to such child or children, at the death of the said last survivor of said sisters and brother, one-third of the corpus of said Trust Fund A and such child or children shall not thereafter share in the income thereof. If any one or more of said children of David A. Hamburger shall attain the age of forty-five years after the death of the last survivor of said sisters and brother of said testator, the trustee shall distribute to such child or children if and when he shall attain the age of forty-five years (but in no event prior to the death of the last survivor of said sisters and brother) one-third of the corpus of said Trust Fund A, and such child or children shall not thereafter share in the income thereof.

(f) From and after the death of the last survivor [346] of said sisters of said testator said trustee shall pay and distribute the net income of said

Respondent's Exhibit A—(Continued)

Trust Fund B to said Florence Hamburger Bryan and said Arthur M. Hamburger and Howard Hamburger until they respectively shall attain the age of forty-five years. If at the death of the last survivor of said sisters of said testator, any one or more of said children of David A. Hamburger shall have attained the age of forty-five years, the Trustee shall distribute to such child or children, at the death of said last survivor of said sisters, one-third of the corpus of said Trust Fund B, and such child or children shall not thereafter share in the income thereof. If any one or more of said children of David A. Hamburger shall attain the age of forty-five years after the death of the last survivor of said sisters of said Testator, the Trustee shall distribute to such child or children if and when he shall attain the age of forty-five years (but in no event prior to the death of the last survivor of said sisters), one-third of the corpus of said Trust Fund B, and such child or children shall not thereafter share in the income thereof. [347]

(g) Subject to the provisions of subparagraph (d) hereof, if said Florence Hamburger Bryan or said Arthur M. Hamburger or Howard Hamburger shall die before said David A. Hamburger, or before attaining the age of forty-five years, then and in that event said trustee upon the happening of the later of the two following contingencies: (1) the death of said David A. Hamburger, or (2) the death of such niece or nephew, shall pay and distribute a one-third (1/3rd) share of the corpus of Trust

Respondent's Exhibit A—(Continued)

Fund A equally among the issue then living of said deceased niece, or nephew per stirpes and not per capita. If such niece or nephew shall leave no such living issue, then said trustee shall at said time pay and distribute a one-third ($1/3$ rd) share of the corpus thereof to the other or others of said niece, Florence Hamburger Bryan, and said nephews, Arthur M. Hamburger and Howard Hamburger, or if any of them be then dead, to the issue of such niece or nephews by right by representation. If there be no such persons then living, then and in that event said trustee shall pay and distribute said corpus to the heirs at law of said Moses A. Hamburger.

(h) If either said niece, Florence Hamburger Bryan, or said nephews, Arthur M. Hamburger or Howard Hamburger, shall die before the last survivor of said sisters, or before attaining the age of forty-five years, then and in that event said trustee upon the happening of the later of the two following contingencies: (1) the death of the last survivor of said sisters, and (2) the death of such niece or nephew, shall pay and distribute a one-third ($1/3$ rd) share of the corpus of Trust Fund B equally among the issue then living of said deceased niece or nephew per stirpes and not per capita. If such niece or nephew shall leave no such living issue, then said trustee shall at said time pay and distribute a one-third ($1/3$ rd) share of the corpus thereof to the other or others of said niece, Florence Hamburger Bryan, and said nephews, Arthur M.

Respondent's Exhibit A—(Continued)

Hamburger and Howard Hamburger, or if any of them be then dead, to [348] the issue of such niece or nephews by right of representation. If there be no such persons then living, then and in that event said trustee shall pay and distribute the said corpus to the heirs at law of said Moses A. Hamburger.

It Is Further Ordered, Adjudged and Decreed that said trustee in making any payments to said Arthur M. Hamburger under the terms of the foregoing provisions of this Decree of Distribution shall make all such payments only to said Arthur M. Hamburger, personally or upon his written order or receipt, but never on an order or receipt given by way of assignment, anticipation or other voluntary transfer or by operation of law by virtue of any attachment, judgment, decree or other legal proceeding against said Arthur M. Hamburger, it being the intention of said testator that the interest of said Arthur M. Hamburger under the provisions of said will should be so created that he could not alienate, transfer or assign the said interest and that the said interest should be exempt from the claims of creditors to the fullest extent permissible by law.

It Is Further Ordered, Adjudged and Decreed that said trustee in addition to the powers incidental to his office shall have the following powers and shall act under the following directions, to wit:

(a) He shall, without further order of Court, have the power to make and change investments, convert personal property into real property, and

Respondent's Exhibit A—(Continued)

the reverse, whenever he shall think it advisable; to exchange any real estate for other real estate, and to sell at any time or times, by public auction or private sale, any property, real or personal, of which the Trust estate may at any time consist, as he shall think best, and may mortgage the same or convey it in fee or for any less estate, and no purchaser shall be required to see to the application of the purchase money of any part thereof. [349]

(b) He shall have the power to compromise or compound any debts owing to him as such trustee, or any other claims, and to adjust any disputes in relation to debts or claims by arbitration or otherwise, and to pay any debts or claims against him as trustee upon any evidence that to him shall seem sufficient in the absence of bad faith.

(c) He may apportion all extra dividends and gains from sales of unproductive real estate and his receipts and expenditures and all losses of income during alterations or improvements of real estate between income and principal, as to him seems fair and just, and any such apportionment made in good faith shall be final; he may consider and pay out all sums received as interest, as income, although the securities may have been purchased at a premium, and may charge expenses and so much of the premiums paid for the security to income or principal, as he shall deem equitable, and may, in general, use his discretion in determining the question as to what receipts and what premiums are income and principal which discretion, exercised in good faith,

Respondent's Exhibit A—(Continued)

shall be final; provided that in the apportionment of all amounts received as dividends upon shares of the capital stock of A. Hamburger & Sons, Inc., or Hamburger Realty Company he shall be governed and controlled by the terms of this decree hereinafter contained.

(d) In any case in which said trustee is required pursuant to the provisions of this decree to divide or set apart any portion of the estate hereby distributed to him into trust funds, parts or shares, or to distribute the same, he is hereby authorized in his discretion to make such division or distribution in kind or in money, or partly in kind and partly in money, and for the purpose of such allotment the judgment of said trustee concerning the propriety thereof and the relative values for the purpose of the distribution or allotment of the securities or properties so allotted shall be binding and conclusive on all persons interested in the [350] trust estate; provided, however, that the shares of the capital stock in said A. Hamburger & Sons, Inc. and said Hamburger Realty Company and any reinvestment of trust corpus derived therefrom shall in any such allotment be made one-fourth ($\frac{1}{4}$ th) to Trust A, and three-fourths ($\frac{3}{4}$ ths) to Trust B, and shares of each of said two corporations transferred in pledge to secure the claim of Eleanor G. Chamberlain, shall be taken in the same proportions, to wit: one-quarter ($\frac{1}{4}$ th) from Trust A and three-quarters ($\frac{3}{4}$ ths) from Trust B.

Respondent's Exhibit A—(Continued)

(e) At the risk of the trust estate and without responsibility to said trustee, said trustee may continue to hold any stocks, bonds, securities or other properties in which at the time of the death of said testator any portion of said trust estate was invested, and shall likewise have full power and authority to dispose of, call in and change any and all investments and to invest and reinvest the said trust estate.

(f) Should any company or corporation in which shares or other interests are hereby distributed to the said trustee increase its capital said trustee is hereby authorized, in his absolute discretion, to subscribe for and take up the proportion of such increased capital to which as holder of shares or other interest in such company or corporation he may be entitled and to pay for the same out of the moneys of said trust estate or in the alternative to sell such rights to such allotment. Said trustee is further authorized, if in his opinion it would be for the interests of the trust estate so to do, to subscribe for and pay for or purchase additional shares in any such company or corporation, and is further authorized, if in his discretion he considers it in the best interests of said trust estate so to do, to join in any plan for the reconstruction, reorganization or amalgamation of any such company or corporation or for the sale of the assets of any such company [351] or corporation, or any part thereof, and he may in pursuance of any such plan accept any shares or securities in lieu of or in exchange for

Respondent's Exhibit A—(Continued)

the shares or other interest held by said trust estate in such company or corporation. Said Trustee is further authorized, if in his discretion he considers it in the best interests of said trust estate so to do, to enter into any pooling or other arrangement in connection with the interests of the trust estate in such company or corporation and in case of sale thereof to give any option he may consider advisable. In connection with the foregoing powers given to said trustee in this subparagraph (f), said trustee shall have power and authority to deal with the interests of the trust estate in any such company or corporation in which the testator was interested at the time of his death to the same extent and as fully as the testator could do if he were alive.

(g) In the event that said David A. Hamburger shall fail to qualify as trustee hereunder or shall subsequently die, resign or become disqualified, then and in that event the sisters of said testator, Belle Alice Nathan, Evelyn Hamburger and Jennie H. Marx, or the survivor or survivors of them, shall be trustees hereunder. In the event that said David A. Hamburger and said Belle Alice Nathan, Evelyn Hamburger and Jennie H. Marx shall all fail to qualify as such trustees or shall subsequently die, resign or become disqualified then and in that event the Farmers and Merchants National Bank of Los Angeles shall be sole trustee hereunder.

It Is Further Ordered, Adjudged and Decreed that said Executor has in and by his final account

Respondent's Exhibit A—(Continued)

filed herein, as set forth in Exhibit "E" thereunto annexed, and as set forth in the Supplemental account, correctly segregated and apportioned as between principal and income all of the receipts and disbursements accruing during the administration of said estate and that the amount shown as received by said Executor as net income, to wit:

Three Hundred Ten Thousand Two Hundred Eighty One and 02/100ths [352] Dollars (\$310,281.02) is correct and is the full amount of net income received by said Executor which accrued subsequent to the death of the testator and prior to this date.

It Is Further Ordered, Adjudged and Decreed that the dividends declared and paid by A. Hamburger & Sons, Inc. and Hamburger Realty Company subsequent to October 29th, 1930, have more than exhausted the entire net profits of said corporations for the period from said date to January 1st, 1934; that with respect to all net income which should accrue subsequent to his death it was the intention of said testator, by the provision contained in said will, that the entire net income of the trust funds therein and herein designated as Trust Fund A and Trust Fund B should be paid by the trustee to certain designated persons; that in determining what portion of dividends declared and paid on stock of A. Hamburger & Sons, Inc. and Hamburger Realty Company (constituting part of the trust estate herein) to the Trustee hereunder (but not as to shares of any other corporations)

Respondent's Exhibit A—(Continued)

constitutes income paid to the trustee for the benefit of the life tenants, the trustee would be entitled to determine that all dividends declared by either of such corporations, to the extent of the net profits before depreciation of the corporation declaring the same, earned since October 29th, 1930, constitute income, and accordingly that such portion thereof as may be paid to the trustee is paid to him for the benefit of the life tenants; but the trustee is hereby directed in determining said question to consider any and all dividends in excess of the net profits after depreciation (if any, as hereinafter defined) of any such corporation earned since October 29th, 1930, as a return of capital, and that such portion thereof as is received by the trustee is paid to him and to be held by him for the benefit of the remaindermen, except as hereinafter expressly otherwise provided, viz: [353]

1. All cash dividends declared and paid by either of said corporations, to the extent of its net profits after depreciation earned after January 1st, 1934, are to be considered as paid from income, and any of such dividends received by the trustee (to the extent that they are so considered as paid from income) should be by him paid and distributed to the persons entitled to the income from the trust estate as hereinbefore provided, subject to the provisions of subdivision 4 hereof.

2. If the Basic Amount (as that term is hereinafter defined) for the calendar year 1934, or any subsequent calendar year, shall be more than the

Respondent's Exhibit A—(Continued)

aggregate net profits after depreciation of A. Hamburger & Sons, Inc. and Hamburger Realty Company for such calendar year, then and in that event an additional portion of the dividend declared and paid by each such corporation in the succeeding calendar year to an aggregate amount equal to such excess shall be considered as paid from income; and any such dividends (to the extent hereinbefore described) received by the trustee shall be by him paid and distributed to the persons entitled to the income from the trust estate as hereinbefore provided. Any dividends treated as paid from income solely by reason of the provisions of this subdivision 2 shall be apportioned between the dividends of said two corporations as nearly equally as possible, subject to the provisions of subdivision 3 hereof. Any dividends considered as paid from income solely by reason of the provisions of this subdivision 2 are so considered in addition to those described in subdivision 1 hereof and shall not be taken in any manner to reduce the amounts considered as paid from income under said subdivision 1.

3. Provided the aggregate amount of dividends of either of said two corporations considered as paid from income solely under the provisions of subdivision 2 hereof shall at no time and in no event exceed the difference between the aggregate net profits of such corporation before depreciation and the aggregate net profits [354] thereof after depreciation for the calendar year 1934 and all subse-

Respondent's Exhibit A—(Continued)

quent calendar years prior to the declaration of the dividend in question.

4. Provided Further if in any calendar year subsequent to 1934 any dividends declared and paid by either of said two corporations are treated as paid from income solely by reason of the provisions of subdivision 2 hereof, and in that or any subsequent calendar year or years the aggregate net profits after depreciation of said two corporations is in excess of the Basic Amount for such calendar year or years, a portion of the cash dividends otherwise to be treated as paid from income under the provisions of subdivision 1 hereof equal in the aggregate to such excess shall be treated as a return of capital until the aggregate of the amounts so treated as a return of capital shall equal all amounts theretofore treated as paid from income solely by reason of the provisions of subdivision 2 hereof. In apportioning the amounts so to be withheld and treated as a return of capital between the cash dividends received from the said two corporations such apportionment shall be made as nearly as possible in the ratio in which cash dividends of said two corporations had theretofore been treated as paid from income solely by reason of the provisions of subdivision 2 hereof. That portion of any such cash dividend received by the trustee, which shall bear the same ratio to the total dividend so received by him as that portion of the dividend declared which is treated as a return of capital solely by reason of the provisions of this subdivision 4, bears to the

Respondent's Exhibit A—(Continued)

entire dividend so declared, shall be by him held for the account of the remaindermen as hereinbefore provided.

5. All cash dividends other than those specified in subdivision 1 and 2 hereof, declared and paid by either of said two corporations are to be considered as constituting a return of capital and any of such dividends received by the trustee shall be by him held for the account of the remaindermen as hereinbefore provided. [355]

6. The term "net profits," as used in the foregoing subdivisions, shall be deemed to mean the net profits of said corporations legally available for dividends after deduction of depreciation (except where expressly stated to be "before depreciation") but before deduction of any amounts for amortization of rent or capitalization of rent received from any leases upon any property owned in fee by A. Hamburger & Sons, Inc. or Hamburger Realty Company, and without including in the computation of such net profits any capital gains or losses. Depreciation shall be deemed to mean that depreciation, if any, allowed by the government of the United States in computing income taxes of said corporations. Further in computing the net profits of A. Hamburger & Sons, Inc. the corporate entity of Carrie O. Sweet Corporation, its wholly owned subsidiary, should be disregarded, and net profits should be determined upon the basis of consolidated financial statements of said corporations; and dividends paid by A. Hamburger & Sons, Inc. to Carrie

Respondent's Exhibit A—(Continued)

O. Sweet Corporation and by said Carrie O. Sweet Corporation back to A. Hamburger & Sons, Inc. should be treated as if they had always remained in A. Hamburger & Sons, Inc. Similarly the net profits of Hamburger Realty Company and its wholly owned subsidiary, N. B. Blackstone Company, should also be computed upon a consolidated basis.

7. The "Basic Amount" for any calendar year, referred to in subdivision 2 above, shall be deemed to mean an amount equal to 150% of the excess, if any, of the aggregate of the expenses of administration, fees, and all other charges of the trust estate, chargeable against the income thereof, as shown in any reports of the trustee approved by this court during such calendar year, over the income of said trust estate (other than income received by way of dividends from A. Hamburger & Sons, Inc. and Hamburger Realty Company), as shown by such reports; plus an additional amount determined as follows: [356]

(a) If Jennie H. Marx, Belle Alice Nathan, Evelyn Hamburger and David A. Hamburger (said persons being hereinafter sometimes referred to as "life tenants") are all alive on the last day of such calendar year \$418,682.00

(b) If only three of said life tenants, no one of whom is David A. Hamburger, are alive on the last day of such calendar year..... 367,521.00

Respondent's Exhibit A—(Continued)

(c) If only three of said life tenants, one being David A. Hamburger, are alive on the last day of such calendar year\$ 346,361.00

(d) If only two of said life tenants, neither of whom is David A. Hamburger, are alive on the last day of such calendar year..... 295,341.00

(e) If only two of said life tenants, one being David A. Hamburger, are alive on the last day of such calendar year..... 228,134.00

(f) If only one of said life tenants, not being David A. Hamburger, is alive on the last day of such calendar year..... 185,844.00

(g) In all other cases there shall be no Basic Amount.

That any discretion vested in the trustee under the terms of this decree in apportioning receipts to income or principal is subject to and controlled by such stipulation and this decree and said trustee should be and he is hereby ordered and directed to [357] keep his accounts as such trustee and make distribution of the receipts of the trust estate accordingly.

It Is Further Ordered, Adjudged and Decreed that the residue of the estate of said testator hereinabove referred to and hereinabove distributed to said trustee consists of all of the following de-

Respondent's Exhibit A—(Continued)

scribed real and personal property, together with any and all other property not now known or discovered belonging to said testator at the time of his death or in which said testator at said time had any right, title or interest or in which the estate of said testator has since his death acquired any right, title or interest, to wit:

Emporium Capwell Co. bonds due October 1, 1942—bearing interest at $5\frac{1}{2}\%$, payable semi-annually, bearing Nos. M6467, M5475, M5466, M5469, M5468, M5470, M5471, M5472, M5473, M5447, M5474, M5476, each in the sum of \$1000 and D627 for the sum of \$500.00.

Yosemite Park & Curry Co. stock Cert. No. C-78 for 771 shares of common capital stock. Yosemite Park & Curry Co. bonds, 6% interest, due January 1, 1934—Certificates Nos. AM-250, AM-251, AM-262 for \$1000 each; and No. A1-38 for \$50.

Metropolitan Mortgage Company $6\frac{1}{2}\%$ bond due July 1, 1936, interest payable semi-annually, Certificate No. M-7 in the sum of \$1000.00.

Los Angeles Chamber of Commerce bonds, due Feb. 7, 1943, bearing 5% interest, payable semi-annually, Certificates Nos. 1896 and 1897 for \$1000 each and one-half interest in Certificate No. 1898 for \$1000.

Montana Power Co., bonds, due July 1, 1943, bearing interest at 5%, payable semi-annually,

Respondent's Exhibit A—(Continued)

Certificates Nos. M9630, M11539 and M11540 in the sum of \$1000 each.

Chicago City Railway Co. bond 5% interest Certificate of Deposit No. 4440 issued by First Trust & Savings Bank for bond No. 24946.

Miley Petroleum Co., Ltd. bonds due August 13, 1934, bearing interest at 6% payable semi-annually—Certificate No. 407 for \$500 and No. 1550 for \$1000.

Broadway Department Store—Certif. No. CL2/0 for 25 shares of common and C1-2 for 100 shares of common; Certif. No. AL128 for 100 shares of first preferred and No. A1 1467 for 25 shares of first preferred, both bearing interest at 7%. [358]

Santa Barbara Biltmore Corpn. stock—Certificate No. 80 for 20 shares and Certificate No. 129 for 30 shares of 8% preferred; Certificate No. 95 for 10 shares and Certificate No. 143 for 15 shares of common.

Farm Lands Company—Certificate Nos. 127 for 40 shares, No. 164 for 30 shares and No. 207 for 20 shares of capital stock.

Union Oil Company of California stock—LA/0 41375 for 5 shares; LA/0 51482 for 5 shares; LA/0 56848 for 5 shares; LA/0 62246 for 5 shares; NY47359; NY47363; NY47362; NY-47361; and NY47360; each for 100 shares; all being for common stock.

Respondent's Exhibit A—(Continued)

Cross Land Company—Certificate No. 156 for 50 shares of capital stock.

Texas Corporation—Certificates Nos. 223393 and 223394 for 100 shares each and No. 0477531 for 50 shares of capital stock.

May Department Stores Company—Certificates Nos. 34264 and 34265 for 100 shares each and No. 046344 for 29 shares of common stock.

International Telephone and Telegraph Co.—NN195912 and NN195913 for 100 shares each and NN-F503677 for 50 shares of common stock.

Equitable Realty Company stock, par value \$100 per share—Certificate No. 68 for 80 shares; No. 38 for 100 shares; No. 50 for 200 shares and No. 1 for 500 shares of preferred stock.

Westgate Building Corporation—bond—Certificate No. 663 for \$500 due January 1, 1946, bearing 6%. Deposit receipt #28157 dated January 30, 1932 signed by Bank of America. 200 Sunset Canyon Country Club \$30.00 8% bonds Nos. 4049 to 4248, inclusive.

1 Membership San Gabriel Country Club, Certificate No. 137.

1 Membership Deauville Beach Club (Founders Life).

A. Hamburger & Sons, Inc. capital stock Certificate No. 46 for 1143.366 shares; and one-half interest in and to Certificate No. 17 for 200 shares, and Certificate No. 9 for 10 shares.

Respondent's Exhibit A—(Continued)

Hamburger Realty Company capital stock Certificate No. 43 for 291.666 shares.

Lots 143 and 144, Tract 6330, as per map recorded in Book 69 of Maps at pages 33, 34, 35, 36 and 37 in the office of the County Recorder of Los Angeles County, being property situated in the City of Santa Monica, County of Los Angeles. [359]

Lot 6, Tract 5663, City of Los Angeles, County of Los Angeles, as per map recorded in Book 61, page 87 of maps, in the office of the County Recorder of said County.

Lot 7, Block 1, La Paloma Tract, Hollywood, in the City of Los Angeles, County of Los Angeles, as per map recorded in Book 5, page 80 of Maps, in the office of the County Recorder of Los Angeles County.

Furniture in apartment house located on Lot 7, Block 1, La Paloma Tract, City of Los Angeles.

Lot 413, Tract 8498, City of Los Angeles, County of Los Angeles, as per map recorded in Book 95, pages 53 to 55 inclusive of Maps, in the office of the County Recorder of Los Angeles County.

Lot 4, Tract 3819, City of Los Angeles, County of Los Angeles, as per map recorded in Book 42, page 36 of Maps, in the office of the County Recorder of said County.

Undivided 5/144ths interest in and to Lots 1 and 2 in Block "C" of the Morris Vineyard

Respondent's Exhibit A—(Continued)

Subdivision, as per map recorded in Book 3, Pages 38 and 39 of Miscellaneous Records in the County of Los Angeles.

Undivided $8/30$ ths interest in and to the following described property, lying and being in the City of Los Angeles, County of Los Angeles, described as follows: The Northeasterly 70 feet of Lots 22 and 24 in Block "A" of the Morris Vineyard Subdivision, as per map recorded in Book 3, pages 38 and 39 of Miscellaneous Records of said County, being 1402 South Hill Street; 70 feet on Hill Street and 102 feet on Fourteenth Street, described as follows: Beginning at the intersection of Hill Street and Fourteenth Street at point at Northwest corner of Lot 24; thence Easterly along the northerly line of Lots 22 and 24, 102 feet to the Northeasterly corner of Lot 22; thence Southwesterly 70 feet along the easterly line of Lot 22; thence West 102 feet parallel with the north line of said Lots 22 and 24 to a point on the Easterly line of Hill Street 70 feet from the point of beginning; thence NEly along Wly line of Lot 24, 70 feet to beginning.

Undivided one-half interest in South 45 feet of the North 48 feet of Lot 5 of H. F. Spencer's Subdivision of the North half of Block 69 of Ord's Survey in the City of Los Angeles, County of Los Angeles, as per map recorded in Book 5, Page 62 of Miscellaneous Records of Los Angeles County.

Respondent's Exhibit A—(Continued)

Lots 55, 56, and 57, Tract 6659, City of and County of Los Angeles, as per map recorded in Book 72, Pages 64 and 65 of Maps in the office of the County Recorder of said Los Angeles County.

Undivided one-half interest in that portion of Block 77 of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 53, page 66, Miscellaneous Records of said [360] County, described as follows: Beginning at the intersection of the Southeasterly line of said Block 77 with the southeasterly prolongation of the Southwesterly line of Tract No. 3246, as per map recorded in Book 35, page 46 of Maps, in the office of the County Recorder of said County, said point being distant Southwesterly 379.16 feet from the most easterly corner of said Block 77 in the southwesterly line of Eleventh Street; thence southwesterly along the southwesterly line of said Block 48.56 feet to the agreement line established between the land of Consolidated Realty Company and H. C. Fryman, by deed recorded in Book 2691, page 237 of Official Records of said County; thence along said agreement line northwesterly parallel with said Eleventh Street, 164.58 feet, more or less, to the north and south center line of said block; thence Northeasterly along said center line, 48.56 feet to the southwesterly line of said Tract No. 3246; thence southeasterly along said southwesterly line and its prolonga-

Respondent's Exhibit A—(Continued)

tion 164.70 feet, more or less, to the point of beginning; except the southeasterly six feet of said land in Hill Street as widened.

Undivided one-half interest in Lot 1 and the North half of the Northwest quarter of Section 29, Township 18 South, Range 1 West, S.B.B. & M., being in San Diego County, State of California.

Undivided one-half interest in East half of Lot 108, Lankershim Ranch Land & Water Company's subdivision of the East 12,000 acres of the South Half of Rancho Ex-Mission of San Fernando, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 31, page 39 of Maps in the office of the County Recorder of Los Angeles County, Except therefrom that portion of the Easterly half of said Lot One Hundred Eight (108) lying Southwesterly of the following described line; Beginning at a point in the Southerly line of said Lot, distant thereon one hundred fifty (150) feet Westerly from the Southeasterly corner of said lot, said corner being a point in the Westerly line of Laurel Canyon Boulevard; thence Northwest-erly in a direct line to a point in a line parallel with and distant six hundred forty-seven and fifty-hundredths (647.50) feet Easterly from the Westerly line of said lot, distant on said parallel line six hundred forty-seven and fifty hundredths (647.50) feet Northerly from the Southerly line of said lot.

Respondent's Exhibit A—(Continued)

It Is Further Orderer, Adjudged and Decreed that David A. Hamburger, Belle Alice Nathan, Evelyn Hamburger and Jennie H. Marx are entitled to receive in equal shares the entire net income of the estate accruing during administration, to wit, the sum of Three Hundred Ten Thousand Two Hundred Eighty-One and 02/100ths Dollars (\$310,281.02), and in addition to the real and personal property hereinabove described there is hereby distributed to said trustee the said sum of Three Hundred Ten Thousand Two Hundred Eighty-One and [361] 02/100ths Dollars (\$310,281.02), which said trustee is hereby authorized and empowered and directed to pay in equal shares to said David A. Hamburger, Belle Alice Nathan, Evelyn Hamburger and Jennie H. Marx.

It Is Further Ordered, Adjudged and Decreed that in and by a certain written contract, dated May 1, 1924, W. E. Chamberlain and Eleanor G. Chamberlain, as first parties, agreed to sell and the decedent and David A. Hamburger Corporation agreed to buy two hundred and ten (210) shares of the capital stock of A. Hamburger & Sons, Inc. and that in and by the said agreement the said decedent and said David A. Hamburger Corporation are jointly and severally liable for the payment of the purchase price of said stock, and that although the claim of Eleanor G. Chamberlain, the survivor of said first parties, has been allowed against the estate of the decedent for the full amount of the unpaid balance of the purchase price,

Respondent's Exhibit A—(Continued)

said estate is entitled to have reimbursed to it, and the trustee, under the will of said decedent, will be entitled to have reimbursed to him by said David A. Hamburger Corporation any and all amounts paid out on said claim in excess of one-half of the amount for which said claim has been allowed. That said contract also provides that A. Hamburger & Sons, Inc., as third party thereto, shall pay to the first parties the sum of \$1326.28 per month from the 1st day of January, 1924, to December 31, 1942, and that it was the intention and understanding of all of the parties to said contract that said amount so paid by said third party should be paid for the use and benefit of the second parties, and that upon payment thereof the said third party should charge one-half of the amount so paid to the account of the decedent and one-half of such amount to David A. Hamburger Corporation, and that ever since the execution of said contract monthly installments in said amount have been paid by said third party and the amounts so paid out have been so charged to the account of the second parties and that said trustee should be and he is hereby authorized and empowered to pay out of the corpus of said trust estate to said A. Hamburger & Sons, Inc. one-half of the amounts which may be so paid by said A. Hamburger & Sons, Inc. upon the purchase price of said stock.

It Is Further Ordered, Adjudged and Decreed that there is unpaid upon the claim of W. E. Chamberlain and Eleanor G. Chamberlain heretofore

Respondent's Exhibit A—(Continued)

allowed by the Executor of the Last Will and Testament [363] of said deceased, and approved by the Court, the sum of One Hundred Ten Thousand Seven Hundred Seventeen and $76/100$ Dollars (\$110,717.76) after deducting all payments made to and including the 1st day of December, 1934. That such sum is payable in monthly installments of One Thousand One Hundred Fifty-three and $31/100$ Dollars (\$1153.31) on the first day of each calendar month, commencing with January 1, 1935, and that Eleanor G. Chamberlain is now the sole owner of said claim and entitled to receive payment of the full amount unpaid thereon. That payment of said amount shall be made from the residue of the estate hereinabove distributed to David A. Hamburger as trustee, and said trustee and his successor or successors in office are charged with the duty of and are hereby ordered and directed to pay the amount of said claim now unpaid in installments, as above set forth, out of the residue of said estate so distributed.

It Is Further Ordered, Adjudged and Decreed that all of the real and personal property constituting the residue of said estate, distributed to said trustee, shall be distributed subject to a general lien or charge in favor of Eleanor G. Chamberlain for the unpaid amount of her claim against said estate, and the said lien or charge shall continue upon all of the principal or corpus of said trust estate, whether the same consists of real, personal and/or mixed property, but not upon the income

Respondent's Exhibit A—(Continued)

therefrom, until such time as said claim has been fully paid and discharged.

In addition thereto, and as further security for the payment of said claim and each instalment thereof, said trustee, upon the entering of said decree, is hereby ordered and directed to have issued to said Eleanor G. Chamberlain as pledgee, and to deliver to her a certificate for five hundred (500) shares of the capital stock of A. Hamburger & Sons, Inc., and a certificate for one hundred and fifty (150) shares of the capital stock of Hamburger Realty Company, and that said Eleanor G. Chamberlain shall have [364] and exercise all the rights of a pledgee with respect to said stock, including the right to exercise, upon failure of the trustee to pay any and all installments of said claim when due, any and all rights of a pledgee of corporate stock upon default in the performance of the obligations secured thereby; provided, however, that so long as installments coming due on said claim are paid when due, the trustee and his successor or successors in office shall be entitled to receive and retain all cash dividends legally paid out of either earnings or surplus by either of said corporations upon said shares.

It Is Further Ordered, Adjudged and Decreed that with respect to all of the real and personal property constituting the residue of said estate herein and hereby distributed to said trustee, other than such shares of capital stock of said corporations, said trustee and his successor or successors

Respondent's Exhibit A—(Continued)

in office shall have and may exercise all the rights, powers and duties herein specified and given as fully as if said lien did not exist, but any and all property or assets constituting corpus or principal of said trust estate which shall come into the hands of said trustee as the result of the exercise of any such rights or powers shall be subject to the lien hereinbefore declared. The trustee may use, distribute and pay over all of the income from said trust estate in the manner and to the parties entitled thereto under the provisions of this decree of distribution, and may, subject to said lien which shall continue in full force and effect until the claim of Eleanor G. Chamberlain shall have been fully paid and discharged, distribute and pay over to any party entitled thereto under the terms of this decree of distribution any portion of the principal or corpus of the trust estate.

It Is Further Ordered, Adjudged and Decreed that all payments due said Eleanor G. Chamberlain upon her said claim heretofore filed and allowed herein up to and including the 1st day of October, 1935, have been paid in full.

It Is Further Ordered, Adjudged and Decreed that all payment [365] due to Alexina Beam upon her claim heretofore, filed in this Court up to and including the 29th day of September, 1935, have been paid in full. That there is payable on such claim the sum of Two Hundred Eight and 34/100 Dollars (\$208.34) on the twenty-ninth day of each and every calendar month, commencing with the

Respondent's Exhibit A—(Continued)

29th day of October, 1935, and continuing during the lifetime of said claimant. That payment of said amount shall be made from the residue of the estate hereinabove distributed to David A. Hamburger as trustee, and said trustee and his successor or successors in interest are charged with the duty of and are hereby ordered and directed to pay the amount of said claim in monthly payments as above set forth out of the residue of said estate so distributed.

It Is Further Ordered, Adjudged and Decreed that all of the real and personal property constituting the residue of the estate distributed to said trustee, excepting the shares of stock hereinabove described which the trustee is hereinabove ordered and directed to transfer to Eleanor G. Chamberlain as pledgee, shall be distributed subject to a general lien or charge in favor of Alexina Beam for the amount of her claim against the said estate, and that the said lien or charge shall continue upon all of the principal or corpus of said trust estate, whether the same consists of real, personal and/or mixed property, but not upon the income therefrom until such time as the said claim has been fully paid and discharged.

It Is Further Ordered, Adjudged and Decreed that with respect to all of the real and personal property constituting the residue of said estate herein and hereby distributed to said trustee, other than the shares of stock referred to in the preceding paragraph, said trustee and his successor or suc-

Respondent's Exhibit A—(Continued)

cessors in office shall have and may exercise all of the rights, powers and duties herein specified and given as fully as if said lien did not exist, but any and all property or assets constituting corpus or principal of said trust estate which shall come into the hands of said trustee as the result of the exercise of [366] any such rights or powers shall be subject to the lien hereinbefore declared. The trustee may use, distribute and pay over all of the income from said trust estate in the manner and to the parties entitled thereto under the provisions of this decree of distribution, and may, subject to said lien which shall continue in full force and effect until the claim of Alexina Beam has been fully paid and discharged, distribute and pay over to any party entitled thereto under the terms of this decree of distribution any portion of the principal or corpus of the trust estate.

It Is Further Ordered, Adjudged and Decreed that the trustee shall pay said obligations in favor of said Eleanor G. Chamberlain and said Alexina Beam out of the corpus of said trust estate.

It Is Further Ordered, Adjudged and Decreed that A. Hamburger & Sons, Inc., a corporation, is now the owner and holder of a certain promissory note for the sum of Four Hundred Nine Thousand One Hundred Eighty Six and 14/100ths Dollars (\$409,186.14), bearing date October 3, 1935, executed by D. A. Hamburger as Executor of the Last Will and Testament of M. A. Hamburger, deceased, and payable on or before five (5) years after date,

Respondent's Exhibit A—(Continued)

with interest at two per cent (2%) per annum, payable annually. That payment of said amount shall be made from the residue of the estate hereinabove distributed to David A. Hamburger, as trustee, and that said trustee and his successor or successors in office are charged with the duty of, and are hereby ordered and directed to pay the amount of said note according to its terms as above set forth out of the residue of said estate so distributed.

It Is Further Ordered, Adjudged and Decreed that all of the real and personal property constituting the residue of the estate distributed to said trustee, excepting the shares of stock hereinabove described, which the trustee is hereinabove ordered and directed to transfer to Eleanor G. Chamberlain, as pledgee, [367] shall be distributed subject to a general lien or charge in favor of A. Hamburger & Sons, Inc. for the amount of said promissory note and that the principal of said promissory note shall be and remain a charge or lien upon all of the principal or corpus of said trust estate, but not upon the income therefrom, until such time as the principal of said note has been fully paid and discharged, and that the principal of said note shall be paid out of the corpus of the trust estate and the interest falling due upon said promissory note shall be paid from the income of said trust estate.

It Is Further Ordered, Adjudged and Decreed that with respect to all of the real and personal property constituting the residue of said estate herein and hereby distributed to said trustee, other

Respondent's Exhibit A—(Continued)

than the shares of stock referred to in the preceding paragraph, said trustee and his successor or successors in office shall have and may exercise all of the rights, powers and duties herein specified and given, as fully as if said lien in favor of A. Hamburger & Sons, Inc. did not exist, but any and all property and assets constituting corpus or principal of said estate, which shall come into the hands of said trustee as the result of the exercise of any of such rights or powers, shall be subject to the lien hereinbefore declared. The trustee may use, distribute and pay over all of the income from said trust estate in the manner and to the parties entitled thereto under this decree of distribution and may, subject to said lien which shall continue in full force and effect until said promissory note has been paid and discharged, distribute and pay over to any party, entitled thereto under the terms of this decree of distribution, any portion of the principal or corpus of this trust estate.

It Is Further Ordered, Adjudged and Decreed that the general lien hereinbefore described in favor of said Eleanor G. Chamberlain, and the lien hereinbefore described in favor of said Alexina Beam, and the lien hereinbefore described in favor of said [368] A. Hamburger & Sons, Inc. shall be and each of said liens is hereby declared to be equal in time and equal in right and of like force and effect, and that whenever necessary to make any payments due upon any of said obligations of said trust estate, any part of the corpus or principal of said trust

Respondent's Exhibit A—(Continued)

estate, except said shares of stock to be pledged to said Eleanor G. Chamberlain, may be used or may be converted or encumbered for such purpose, and the proceeds be used for the purpose of making such payments without any requirement that any amount of corpus so used, converted or encumbered be paid upon either of the other of said liens; provided, however, that the lien to secure the claim of said Eleanor G. Chamberlain and the claim of Alexina Beam, and the obligation to said A. Hamburger & Sons, Inc., together with the obligation to pay the same, are imposed and shall be maintained by the trustee in the proportion of one-fourth ($\frac{1}{4}$ th) on the corpus of Trust A and three-quarters ($\frac{3}{4}$ ths) on the corpus of Trust B.

It Is Further Ordered, Adjudged and Decreed that said Executor has retained and has in his hands funds belonging to the estate of said deceased in the sum of Twenty One Thousand Two Hundred Ninety One and $\frac{62}{100}$ ths Dollars (\$21,291.62), which said amount has been retained by said Executor for the purpose of paying and discharging any and all income taxes due the United States of America accruing during the administration of said estate, and said Executor is hereby ordered and directed, after application of said funds has been made to the payment of said income tax and any other expenses incidental to the closing of the estate of said deceased, to account to and pay over to the trustee any residue or remainder of said

Respondent's Exhibit A—(Continued)

sum that may remain in his hands unexpended, and that should the account so retained by said Executor be insufficient to fully pay and discharge any and all taxes hereafter levied or assessed against any income of said estate received during administration, the said trustee or his successor or successors in office [369] are hereby authorized, directed and ordered to pay any unpaid balance of said taxes out of the corpus and income of said trust estate in the following proportions: one-fourth out of the corpus of said trust estate and three-fourths out of the income of said trust estate; that any residue of the amount so retained by the Executor shall, upon the receipt thereof by the trustee, be credited one-fourth to principal of the trust estate and three-fourths to income of said trust estate.

Dated this 4th day of October, 1935.

ARTHUR KEETCH,
Judge.

O. K.

C. Brown

Consented to and approved as to form.

FLINT & MacKAY,
By WESLEY L. NUTTEN, JR.,
Attorneys for Eleanor G.
Chamberlain.

RESPONDENT'S EXHIBIT C

Los Angeles, California, January 1, 1938.
\$673,578.90

For value received, the undersigned promises to pay to A. Hamburger & Sons, Inc., a California corporation, or order, at the main office of Union Bank & Trust Co. of Los Angeles, in the City of Los Angeles, California, the sum of \$673,578.90 in installments as follows:

On or before March 10th of each of the years 1939 to 1943 (both inclusive), the sum of \$30,000.00; and

On or before March 10th of each of the years 1944 to 1967 (both inclusive), unless the entire principal of the indebtedness evidenced hereby shall have been sooner paid, the sum of \$20,000.00; and

On or before March 10th, 1968, the entire unpaid principal balance of the indebtedness evidenced hereby.

All unpaid balances of said indebtedness shall bear interest at the rate of two per cent (2%) per annum, payable on March 10, 1939, and annually thereafter. The undersigned shall have the right at any time or times and from time to time to prepay any or all of said installments.

If the total amount of all "ordinary," "supplementary," and "additional" dividends (as those terms are now defined in the By-Laws of A. Hamburger & Sons, Inc., and Hamburger Realty Company) declared and paid by said two corporations in the twelve-month period immediately preceding the due date of any of such installments to and in-

cluding March 10, 1943, shall be less than \$420,000.00, such installment shall be reduced by a sum equal to 31% of such deficiency.

If the total amount of such "ordinary," "supplementary" and "additional" dividends declared and paid by [371] said two corporations in the twelve-month period immediately preceding the due date of any such installments after March 10, 1943, to and including March 10, 1967, shall be less than \$250,000.00, such installment shall be reduced by a sum equal to 31% of such deficiency.

If, in any such twelve-month period the total amount of such "ordinary," "supplementary," and "additional" dividends declared and paid by said two corporations shall exceed the sum fixed above (\$420,000.00 or \$250,000.00), as the case may be, the installment due at the end of such period shall be increased by a sum equal to 31% of such excess, but in no event more than the total amount of all outstanding reductions theretofore effected pursuant to the foregoing provisions hereof.

The undersigned further agrees to pay on account of said principal, to apply on the latest maturing installments then unpaid, a sum equal to 31% of all dividends, other than "ordinary," "supplementary," and "additional" dividends, hereafter declared and paid by A. Hamburger & Sons, Inc.

If hereafter Article XX of the By-Laws of A. Hamburger & Sons, Inc., or Hamburger Realty Company shall be amended or repealed or shall terminate by its terms, any dividends thereafter de-

clared and paid by such corporations shall, for the purpose of computing the payments due hereunder, be deemed to be an "ordinary," "supplementary" or "additional" dividend to the extent that they would have been such had such By-Law remained [372] in full force and effect.

In case suit is instituted to collect this note, or any portion thereof, the undersigned further promises to pay such additional sum as the Court may adjudge reasonable as attorney's fees in such suit.

This is a renewal note, given in renewal of the promissory note of the undersigned in favor of the above-named payee, identical in amount with this note, but dated January 27, 1937.

If default be made in the payment of any sums due hereunder the holder hereof may, at its option, give written notice to the undersigned (served upon it in the manner provided by law for service of summons) of such default, and of its option to declare the entire unpaid balance of the indebtedness evidenced hereby immediately due and payable; and if payment of such sums be not made within ninety (90) days after the giving of such notice, said entire indebtedness shall, at the expiration of such time, become immediately due and payable.

The undersigned is the owner of 993.366 shares of the capital stock of A. Hamburger & Sons, Inc., represented by Certificate No. 61. The undersigned agrees that A. Hamburger & Sons, Inc., has and shall have a lien for the securing of the indebtedness evidenced hereby upon all of the right, title

and interest of the undersigned in or to the shares of stock of A. Hamburger & Sons, Inc., represented by said Certificate No. 61 and now owned by the undersigned as aforesaid; and further agrees that said A. Hamburger & Sons, Inc., may apply any dividends hereafter declared by it, and payable upon any of such shares, to the payment of any sums then due and payable hereunder. [373]

The undersigned agrees to permit A. Hamburger & Sons, Inc., to make appropriate endorsement referring to this agreement upon the certificates representing said shares. Said endorsement may be in substantially the following form:

“The shares represented by this stock are subject to a lien in favor of the issuing corporation as provided in a promissory note of the holder of said shares dated January 1, 1938. As provided in said note, the issuing corporation has the right to apply dividends payable on the stock represented hereby to the payment of the indebtedness evidenced by said note; and may refuse to permit any transfer of said shares on its books until said indebtedness shall have been fully paid, when the transferee shall give his written consent that such transfer is made subject to the terms of said agreement, including the right to apply dividends to the payment of said indebtedness. For further terms of said lien and agreement reference is made to said promissory note.”

The undersigned further agrees that A. Hamburger & Sons, Inc., may, in its discretion, refuse to permit any transfer upon its books of any or all of the aforementioned shares of stock until after the entire indebtedness evidenced hereby shall have been paid, unless the transferee shall give his written consent that such transfer is made subject to all of the provisions of this agreement, including the right to apply dividends to the payment of the indebtedness secured hereby, as hereinbefore provided, and also including the application of this provision to any future transfers [374] of said shares.

No transferee of said stock shall, however, be personally liable for the payment of the indebtedness evidenced hereby unless he expressly assumes and agrees to pay the same.

Nothing herein contained shall be deemed to in anywise modify the obligation of A. Hamburger & Sons, Inc., and Hamburger Realty Company, or either of them, or of the members of the respective boards of directors to make and distribute dividends as provided by Article XX of the By-Laws hereinabove referred to of each of said corporations.

For the further securing of the indebtedness evidenced hereby, the undersigned has delivered to Union Bank & Trust Co. of Los Angeles the certificate representing the shares of stock aforesaid. In the event of any default by the undersigned in the making of any of the payments herein provided, A. Hamburger & Sons, Inc., is authorized to demand delivery of said certificate to it; and

upon such delivery shall hold said certificate and the shares evidenced thereby in pledge for the further security hereof.

In Witness Whereof, the undersigned has executed this instrument as of January 1, 1938.

DAVID A. HAMBURGER
CORPORATION.

/s/ By D. A. HAMBURGER,

President,

and

/s/ K. F. HAMBURGER,

Secretary. [375]

RESPONDENT'S EXHIBIT D

Los Angeles, California, January 1, 1938.

\$66,027.85.

For value received, the undersigned promises to pay to A. Hamburger & Sons, Inc., a California corporation, or order, at the main office of Union Bank & Trust Co. of Los Angeles, in the City of Los Angeles, California, the sum of \$66,027.85 in installments as follows:

On or before March 10, 1945 the sum of \$231.00;

On or before March 10th of each of the years 1946 to 1967 (both inclusive) unless the entire principal of the indebtedness evidenced hereby shall have been sooner paid, the sum of \$2,860.00; and

On or before March 10, 1968, the entire unpaid principal balance of the indebtedness evidenced hereby.

All unpaid balances of said indebtedness shall bear interest at the rate of two per cent (2%) per annum, payable on March 10, 1939, and annually thereafter. The undersigned shall have the right at any time or times and from time to time to prepay any or all of said installments.

If the total amount of such "ordinary," "supplementary" and "additional" dividends declared and paid by said two corporations in the twelve-month period immediately preceding the due date of any of such installments to and including March 10, 1967, shall be less than \$250,000.00, such installment shall be reduced by a sum equal to 11% of such deficiency.

If, in any such twelve-month period the total amount of such "ordinary," "supplementary," and "additional" dividends declared and paid by said two corporations shall exceed the sum of \$250,000.00, the installment due at the end of such period shall be increased by a sum equal to 11% of such excess, but in no event more than the total [376] amount of all outstanding reductions theretofore effected pursuant to the foregoing provisions hereof.

The undersigned further agrees to pay on account of said principal, to apply on the latest maturing installments then unpaid, a sum equal to 11% of all dividends, other than "ordinary," "supplementary," and "additional" dividends, hereafter declared and paid by A. Hamburger & Sons, Inc.

If hereafter Article XX of the By-Laws of A. Hamburger & Sons, Inc., or Hamburger Realty Company shall be amended or repealed or shall ter-

minate by its terms, any dividends thereafter declared and paid by such corporations shall, for the purpose of computing the payments due hereunder, be deemed to be an "ordinary," "supplementary" or "additional" dividend to the extent they would have been such had such By-Law remained in full force and effect.

In case suit is instituted to collect this note, or any portion thereof, the undersigned further promises to pay such additional sum as the court may adjudge reasonable as attorney's fees in such suit.

This note and a note of like date for \$19,789.29 in favor of the above-named payee are given in substitution of a renewal note dated January 1, 1938, for \$85,817.14 given in renewal of two promissory notes in favor of the above named payee, both dated January 27, 1937, one of which notes was signed by the undersigned alone, and the other of which was signed by the undersigned, Jennie H. Marx and Evelyn Hamburger. This note is for the renewal of the note signed by the undersigned alone, and the note for \$19,789.29 executed concurrently herewith is in renewal of one-third of the amount of the note signed by the undersigned, [377] Jennie H. Marx, and Evelyn Hamburger.

If default be made in the payment of any sums due hereunder, the holder hereof may, at its option, give written notice to the undersigned (served upon her in the manner provided by law for service of summons) of such default, and of its option to declare the entire unpaid balance of the indebtedness

evidenced hereby immediately due and payable; and if payment of such sums be not made within ninety (90) days after the giving of such notice, said entire indebtedness shall, at the expiration of such time, become immediately due and payable.

The undersigned is the owner of 131 shares of the capital stock of A. Hamburger & Sons, Inc., represented by Certificate No. 55. The undersigned agrees that A. Hamburger & Sons, Inc., has and shall have a lien for the securing of the indebtedness evidenced hereby and the indebtedness evidenced by said note for \$19,789.29 upon all of the right, title and interest of the undersigned in or to the shares of stock of A. Hamburger & Sons, Inc., represented by said Certificate No. 55 and now owned by the undersigned as aforesaid; and further agrees that said A. Hamburger & Sons, Inc., may apply any dividends hereafter declared by it, and payable upon any of such shares, to the payment of any sums then due and payable hereunder or under said note for \$19,789.29.

The undersigned agrees to permit A. Hamburger & Sons, Inc., to make appropriate endorsement referring to this note and to said note for \$19,789.29 upon the certificate representing said shares. Said endorsement may be in substantially the following form:

“The shares represented by this certificate are subject to a lien in favor of the issuing [378] corporation as provided in two promissory notes of the holder of said shares dated January 1,

1938. As provided in said notes, the issuing corporation has the right to apply dividends payable on the stock represented hereby to the payment of the indebtednesses evidenced by said notes; and may refuse to permit any transfer of said shares on its books until said indebtednesses shall have been fully paid, unless the transferee shall give his written consent that such transfer is made subject to the terms of said note, including the right to apply dividends to the payment of said indebtednesses. For further terms of said lien and agreement reference is made to said promissory notes and the pledge agreement securing the same."

The undersigned further agrees that A. Hamburger & Sons, Inc., may, in its discretion, refuse to permit any transfer upon its books of any or all of the aforementioned shares of stock until after the entire indebtednesses evidenced hereby and by said note for \$19,789.29 shall have been paid, unless the transferee shall give his written consent that such transfer is made subject to all of the provisions of this note and of said note for \$19,789.29, including the right to apply dividends to the payment of the indebtednesses secured hereby and by said note for \$19,789.29, as hereinbefore provided, and also including the application of this provision and of the similar provision contained in said note for \$19,789.29 to any future transfers of said shares.

No transferee of said stock shall, however, be personally liable for the payment of the indebted-

ness evidenced hereby unless he expressly assumes and agrees to pay the same.

Nothing herein contained shall be deemed to in anywise modify the obligation of A. Hamburger & Sons, Inc., and Hamburger Realty Company, or either of them, or of the members of the respective boards of directors to make and distribute dividends as provided by Article XX of the By-Laws hereinabove referred to of each of said corporations.

For the further securing of the indebtedness evidenced hereby and by said note for \$19,789.29, the undersigned has delivered to Union Bank & Trust Co. of Los Angeles the certificate representing the shares of stock aforesaid. In the event of any default by the undersigned in the making of any of the payments herein provided or provided in said note for \$19,789.29, A. Hamburger & Sons, Inc., is authorized to demand delivery of said certificate to it; and upon such delivery shall hold said certificate and the shares evidenced thereby in pledge for the further security hereof and for said note for \$19,789.29.

In Witness Whereof, the undersigned has executed this instrument as of January 1, 1938.

/s/ BELLE A. H. NATHAN.

wab:eg

12/22/38 [380]

RESPONDENT'S EXHIBIT E

Los Angeles, California, January 1, 1938.

\$150,899.40

For value received, the undersigned promises to pay to A. Hamburger & Sons, Inc., a California corporation, or order, at the main office of Union Bank & Trust Co. of Los Angeles, in the City of Los Angeles, California, the sum of \$150,899.40 in installments as follows:

On or before March 10th, 1942, the sum of \$2,966.71;

On or before March 10th of each of the years 1943 to 1967 (both inclusive), unless the entire principal of the indebtedness evidenced hereby shall have been sooner paid, the sum of \$5,689.00; and

On or before March 10th, 1968, the entire unpaid principal balance of the indebtedness evidenced hereby.

All unpaid balances of said indebtedness shall bear interest at the rate of two per cent (2%) per annum, payable on March 10, 1939, and annually thereafter. The undersigned shall have the right at any time or times and from time to time to prepay any or all of said installments.

If the total amount of all "ordinary," "supplementary," and "additional" dividends (as those terms are now defined in the By-Laws of A. Hamburger & Sons, Inc., and Hamburger Realty Company) declared and paid by said two corporations in the twelve-month period immediately preceding the due date of any of such installments to and in-

cluding March 10, 1943, shall be less than \$420,000.00, such installment shall be reduced by a sum equal to eleven per cent (11%) of such deficiency.

If the total amount of such "ordinary," "supplementary" and "additional" dividends declared and paid by said two corporations in the twelve-month period immediately preceding the due date of any of such installments after March 10, 1943, to and including March 10, 1967, shall be less than \$250,000.00, such installments shall be reduced by a sum [381] equal to eleven per cent (11%) of such deficiency.

If, in any such twelve-month period the total amount of such "ordinary," "supplementary," and "additional" dividends declared and paid by said two corporations shall exceed the sum fixed above (\$420,000.00 or \$250,000.00, as the case may be) the installment due at the end of such period shall be increased by a sum equal to eleven per cent (11%) of such excess, but in no event more than the total amount of all outstanding reductions theretofore effected pursuant to the foregoing provisions hereof.

The undersigned further agrees to pay on account of said principal, to apply on the latest maturing installments then unpaid, a sum equal to eleven per cent (11%) of all dividends, other than "ordinary," "supplementary," and "additional" dividends, hereafter declared and paid by A. Hamburger & Sons, Inc.

If hereafter Article XX of the By-Laws of A. Hamburger & Sons, Inc., or Hamburger Realty Company shall be amended or repealed or shall

terminate by its terms, any dividends thereafter declared and paid by such corporations shall, for the purpose of computing the payments due hereunder, be deemed to be an "ordinary," "supplementary" or "additional" dividend to the extent they would have been such had such By-Law remained in full force and effect.

In case suit is instituted to collect this note, or any portion thereof, the undersigned further promises to pay such additional sum as the court may adjudge reasonable as attorney's fees in such suit.

This note and a note of like date for \$19,789.29 in favor of the above-named payee, are given in substitution of a renewal note dated January 1, 1938, for \$170,688.69 given in renewal of two promissory notes in favor of the above-named [382] payee, both dated January 27, 1937, one of which notes was signed by the undersigned alone, and the other of which was signed by the undersigned, Belle A. H. Nathan and Evelyn Hamburger. This note is for the renewal of the note signed by the undersigned alone, and the note for \$19,789.29 executed concurrently herewith is in renewal of one-third of the amount of the note signed by the undersigned, Belle A. H. Nathan and Evelyn Hamburger.

If default be made in the payment of any sums due hereunder, the holder hereof may, at its option, give written notice to the undersigned (served upon her in the manner provided by law for service of summons) of such default, and of its option to declare the entire unpaid balance of the indebtedness evidenced hereby immediately due and pay-

able; and if payment of such sums be not made within ninety (90) days after the giving of such notice, said entire indebtedness shall, at the expiration of such time, become immediately due and payable.

The undersigned is the owner of 261 shares of the capital stock of A. Hamburger & Sons, Inc., represented by Certificate No. 59. The undersigned agrees that A. Hamburger & Sons, Inc., has and shall have a lien for the securing of the indebtedness evidenced hereby and the indebtedness evidenced by said note for \$19,789.29 upon all of the right, title and interest of the undersigned in or to the shares of stock of A. Hamburger & Sons, Inc., represented by said Certificate No. 59 and now owned by the undersigned as aforesaid; and further agrees that said A. Hamburger & Sons, Inc., may apply any dividends hereafter declared by it, and payable upon any of such shares, to the payment of any sums then due and payable hereunder, or under said note for \$19,789.29. [383]

The undersigned agrees to permit A. Hamburger & Sons, Inc., to make appropriate endorsement referring to this note and to said note for \$19,789.29 upon the certificate representing said shares. Said endorsement may be in substantially the following form:

“The shares represented by this certificate are subject to a lien in favor of the issuing corporation as provided in two promissory notes of the holder of said shares dated January 1, 1938. As provided in said notes, the issuing cor-

poration has the right to apply dividends payable on the stock represented hereby to the payment of the indebtednesses evidenced by said notes; and may refuse to permit any transfer of said shares on its books until said indebtednesses shall have been fully paid, unless the transferee shall give his written consent that such transfer is made subject to the terms of said notes, including the right to apply dividends to the payment of said indebtednesses. For further terms of said lien and agreement reference is made to said promissory notes and the pledge agreement securing the same."

The undersigned further agrees that A. Hamburger & Sons, Inc., may, in its discretion, refuse to permit any transfer upon its books of any or all of the aforementioned shares of stock until after the entire indebtednesses evidenced hereby and by said note for \$19,789.29 shall have been paid, unless the transferee shall give his written consent that such transfer is made subject to all of the provisions of this note and of said note for \$19,789.29, including the right to apply dividends [384] to the payment of the indebtednesses secured hereby and by said note for \$19,789.29, as hereinbefore provided, and also including the application of this provision and of the similar provisions contained in said note for \$19,789.29 to any future transfers of said shares.

No transferee of said stock shall, however, be personally liable for the payment of the indebtedness

evidenced hereby unless he expressly assumes and agrees to pay the same.

Nothing herein contained shall be deemed to in anywise modify the obligation of A. Hamburger & Sons, Inc., and Hamburger Realty Company, or either of them, or of the members of the respective boards of directors to make and distribute dividends as provided by Article XX of the By-Laws hereinabove referred to of each of said corporations.

For the further securing of the indebtedness evidenced hereby and by said note for \$19,789.29, the undersigned has delivered to Union Bank & Trust Co. of Los Angeles the certificate representing the shares of stock aforesaid. In the event of any default by the undersigned in the making of any of the payments herein provided or provided in said note for \$19,789.29, A. Hamburger & Sons, Inc., is authorized to demand delivery of said certificate to it; and upon such delivery shall hold said certificate and the shares evidenced thereby in pledge for the further security hereof and for said note for \$19,789.29.

In Witness Whereof, the undersigned has executed this instrument as of January 1, 1938.

/s/ JENNIE H. MARX.

12/28/38

wab:eg [385]

RESPONDENT'S EXHIBIT F

Los Angeles, California, January 1, 1938.

\$98,736.80

For value received, the undersigned promises to pay to A. Hamburger & Sons, Inc., a California corporation, or order, at the main office of Union Bank & Trust Co. of Los Angeles, in the City of Los Angeles, California, the sum of \$98,736.80 in installments as follows:

On or before March 10th of each of the years 1944 to 1967 (both inclusive), unless the entire principal of the indebtedness evidenced hereby shall have been sooner paid, the sum of \$3,950.00; and

On or before March 10, 1968, the entire unpaid principal balance of the indebtedness evidenced hereby.

All unpaid balances of said indebtedness shall bear interest at the rate of two per cent (2%) per annum, payable on March 10, 1939, and annually thereafter. The undersigned shall have the right at any time or times and from time to time to pre-pay any or all of said installments.

If the total amount of such "ordinary," "supplementary" and "additional" dividends declared and paid by said two corporations in the twelve-month period immediately preceding the due date of any of such installments to and including March 10, 1967, shall be less than \$250,000.00, such installment shall be reduced by a sum equal to 11% of such deficiency.

If, in any such twelve-month period the total amount of such "ordinary", "supplementary", and

“additional” dividends declared and paid by said two corporations shall exceed the sum of \$250,000.00, the installment due at the end of such period shall be increased by a sum equal to [386] 11% of such excess, but in no event more than the total amount of all outstanding reductions theretofore effected pursuant to the foregoing provisions hereof.

The undersigned further agrees to pay on account of said principal, to apply on the latest maturing installments then unpaid, a sum equal to 11% of all dividends, other than “ordinary,” “supplementary,” and “additional” dividends, hereafter declared and paid by A. Hamburger & Sons, Inc.

If hereafter Article XX of the By-Laws of A. Hamburger & Sons, Inc., or Hamburger Realty Company shall be amended or repealed or shall terminate by its terms, any dividends thereafter declared and paid by such corporations shall, for the purpose of computing the payments due hereunder, be deemed to be an “ordinary,” “supplementary” or “additional” dividend to the extent they would have been such had such By-Laws remained in full force and effect.

In case suit is instituted to collect this note, or any portion thereof, the undersigned further promises to pay such additional sum as the court may adjudge reasonable as attorney’s fees in such suit.

This note and a note of like date for \$19,789.29 in favor of the above-named payee, are given in substitution of a renewal note dated January 1, 1938, for \$118,526.09 given in renewal of two promissory

notes in favor of the above-named payee, both dated January 27, 1937, one of which notes was signed by the undersigned alone, and the other of which was signed by the undersigned, Belle A. H. Nathan, and Jennie H. Marx. This note is for the renewal of the note signed by the undersigned alone, and the [387] note for \$19,789.29 executed concurrently herewith is in renewal of one-third of the amount of the note signed by the undersigned, Belle A. H. Nathan, and Jennie H. Marx.

If default be made in the payment of any sums due hereunder, the holder hereof may, at its option, give written notice to the undersigned (served upon her in the manner provided by law for service of summons) of such default, and of its option to declare the entire unpaid balance of the indebtedness evidenced hereby immediately due and payable; and if payment of such sums be not made within ninety (90) days after the giving of such notice, said entire indebtedness shall, at the expiration of such time, become immediately due and payable.

The undersigned is the owner of 181 shares of the capital stock of A. Hamburger & Sons, Inc., represented by Certificate No. 57. The undersigned agrees that A. Hamburger & Sons, Inc., has and shall have a lien for the securing of the indebtedness evidenced hereby and the indebtedness evidenced by said note for \$19,789.29 upon all of the right, title and interest of the undersigned in or to the shares of stock of A. Hamburger & Sons, Inc., represented by said Certificate No. 57 and now owned by the undersigned as aforesaid; and fur-

ther agrees that said A. Hamburger & Sons, Inc., may apply any dividends hereafter declared by it, and payable upon any of such shares, to the payment of any sums then due and payable hereunder or under said note for \$19,789.29.

The undersigned agrees to permit A. Hamburger & Sons, Inc., to make appropriate endorsement referring to this note and to said note for \$19,789.29 upon the certificate representing said shares. Said endorsement may be in [388] substantially the following form:

“The shares represented by this certificate are subject to a lien in favor of the issuing corporation as provided in two promissory notes of the holder of said shares dated January 1, 1938. As provided in said notes, the issuing corporation has the right to apply dividends payable on the stock represented hereby to the payment of the indebtednesses evidenced by said notes; and may refuse to permit any transfer of said shares on its books until said indebtednesses shall have been fully paid, unless the transferee shall give his written consent that such transfer is made subject to the terms of said Notes, including the right to apply dividends to the payment of said indebtedness. For further terms of said lien and agreement reference is made to said promissory notes and to the pledge agreement securing the same.”

The undersigned further agrees that A. Hamburger & Sons, Inc., may, in its discretion, refuse

to permit any transfer upon its books of any or all of the aforementioned shares of stock until after the entire indebtedness evidenced hereby and by said note for \$19,789.29 shall have been paid, unless the transferee shall give his written consent that such transfer is made subject to all of the provisions of this note and of said note for \$19,789.29, including the right to apply dividends to the payment of the indebtednesses secured hereby and by said note for \$19,789.29, as hereinbefore provided, and also including the application of this provision and of the similar provision contained [389] in said note for \$19,789.29 to any future transfers of said shares.

No transferee of said stock shall, however, be personally liable for the payment of the indebtedness evidenced hereby unless he expressly assumes and agrees to pay the same.

Nothing herein contained shall be deemed to in anywise modify the obligation of A. Hamburger & Sons, Inc., and Hamburger Realty Company, or either of them, or of the members of the respective boards of directors to make and distribute dividends as provided by Article XX of the By-Laws hereinabove referred to of each of said corporations.

For the further securing of the indebtedness evidenced hereby and by said note for \$19,789.29, the undersigned has delivered to Union Bank & Trust Co. of Los Angeles the certificate representing the shares of stock aforesaid. In the event of any default by the undersigned in the making of any of the payments herein provided or provided in said

note for \$19,789.29, A. Hamburger & Son., Inc., is authorized to demand delivery of said certificate to it; and upon such delivery shall hold said certificate and the shares evidenced thereby in pledge for the further security hereof and for said note for \$19,789.29.

In Witness Whereof, the undersigned has executed this instrument as of January 1, 1938.

/s/ EVELYN HAMBURGER.

wab:eg

12/22/38

The Tax Court of The United States

Docket No. 3992

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, P. L. NATHAN, et al., Executors,
505 South Windsor Boulevard, Los Angeles,
California,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

STIPULATION OF FACTS

It Is Hereby Stipulated, by and between the above-entitled parties, by and between their respective counsel, that the following facts are true:

I.

That Belle Alice Hamburger Nathan died on the 13th day of October, 1940. That P. L. Nathan and Evelyn Hamburger are the duly appointed, qualified and acting Executors of the Last Will and Testament of said decedent.

II.

That said Executors did elect the optional date of valuation, as authorized by Section 811 (j) of the Internal Revenue Code. That the basic date is October 13, 1941.

III.

That petitioners duly filed Federal Estate Tax Return, Form 706, with the Collector of Internal Revenue, Sixth District of California, within the time prescribed by law, and concurrently with the [391] said filing paid the tax shown to be due thereon.

IV.

That the Exhibits numbered 1 to 8, both inclusive, hereto attached and made a part hereof, may be introduced into evidence and accepted by the above-entitled Court as true;

Exhibit 1 is a Balance Sheet of the Hamburger Realty Company on the basic date hereof, showing in Column A thereof the book value of the assets, liabilities, and the total net worth, and in Column B thereof, the fair market value of the assets.

Exhibit 2 is the Profit and Loss Statement of Hamburger Realty Company for the period be-

ginning 1936 to and including the year 1943.

Exhibit 3 is the record of the dividends paid by the Hamburger Realty Company for the period beginning 1936 to and including the year 1943.

Exhibit 4 is the Balance Sheet of A. Hamburger & Sons, Inc., showing the assets, liabilities, and total net worth thereof, together with their book value in Column A and their fair market value on the basic date in Column B, with the exception of the asset 104.167 shares of Hamburger Realty Company stock, which shows only the book value in Column A. The Tax Court of the United States is authorized to insert in Column B the fair market value found by it for the shares of stock of the Hamburger Realty Company.

Exhibit 5 is the Profit and Loss Statement of A. Hamburger & Sons, Inc., for the period beginning with the year 1936 to the year 1943, both inclusive.

Exhibit 6 shows the dividends paid by A. Hamburger & Sons, Inc., for the period beginning with the year 1936 to the year 1943, both inclusive. [392]

Exhibit 7 is Lease entered into by and between A. Hamburger & Sons, Inc., and The May Department Stores Company on the 30th day of March, 1923.

Exhibit 8 is Lease entered into by and between Hamburger Realty Company and The May Department Stores Company under date of the 30th day of March, 1923.

V.

That on the 30th day of March, 1923, there was in existence a lease from the Hamburger Realty Company to A. Hamburger & Sons, Inc., for the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, which lease terminated on December 31, 1942, and which lease provided for an annual rental of \$250,000.00 payable by the said A. Hamburger & Sons, Inc., to Hamburger Realty Company.

VI.

That both the Hamburger Realty Company and A. Hamburger & Sons, Inc., are corporations organized and existing under the laws of the State of California, with their principal office and only place of business located in the County of Los Angeles, State of California.

VII.

That on the basic date the number of shares of stock of Hamburger Realty Company issued and outstanding was 1000 shares of common stock of \$1000.00 par value each.

VIII.

That on the basic date the number of shares of stock of A. Hamburger & Sons, Inc., issued and outstanding was 3,774.183 shares of the common stock of \$1000.00 par value each.

IX.

That on the basic date there were no other shares of stock, [393] either common, preferred, or other-

wise, and no bonds of the Hamburger Realty Company or A. Hamburger & Sons, Inc., outstanding.

X.

Attached hereto and marked Exhibit 9 is a copy of pages 1919 to 1922, inclusive, of Moody's Manual of Investment, 1941 Edition, being the portion of the Manual containing the report on The May Department Stores Company.

XI.

The stock of the Hamburger Realty Company on the basic date was owned as follows:

104.167 shares by Petitioners herein;

104.167 shares by Evelyn Hamburger;

104.167 shares by Jennie H. Marx, or by a Trust created by her;

291.666 shares by David A. Hamburger Corporation; and

291.666 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased;

104.167 shares by A. Hamburger & Sons, Inc.

XII.

That the stock of A. Hamburger & Sons, Inc., on the basic date was owned as follows:

425.817 shares by Petitioners herein;

425.817 shares by Evelyn Hamburger;

425.817 shares by Jennie H. Marx, or by a Trust created by her;

1248.366 shares by David A. Hamburger Corporation; and

1248.366 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased. [394]

XIII.

That all of the parties named in Paragraphs XI and XII are brothers and sisters.

XIV.

That no shares of stock of Hamburger Realty Company or of A. Hamburger & Sons, Inc., have ever been sold and that each of said corporations is a closed family corporation.

XV.

That on the basic date the President, General and Executive Manager of said corporations was David A. Hamburger, aged 84 years. That the Vice President of said corporations on the basic date was Evelyn Hamburger, aged 72 years. That the Secretary-Treasurer of each of said corporations was P. L. Nathan, aged 76 years. That said Jennie H. Marx was 81 years of age on the basic date.

XVI.

That neither the Articles of Incorporation of A. Hamburger & Sons, Inc., nor of Hamburger Realty Company provide for cumulative voting of the stock.

XVII.

That the additional deduction as compensation for the Executors of the above-named decedent over

and above the fees heretofore allowed in the statutory notice of deficiency, being Exhibit A attached to the petition on file herein, will be submitted on recomputation under Rule 50. [395]

XVIII.

That the additional deduction as compensation for the fees of the attorneys for Petitioners over and above the fees heretofore allowed in the statutory notice of deficiency, being Exhibit A attached to the petition on file herein, will be submitted on recomputation under Rule 50.

XIX.

That either party hereto may introduce such additional evidence as is not in conflict with this Stipulation.

Dated this 3rd day of October, 1945.

/s/ CLAUDE I. PARKER,
/s/ RALPH W. SMITH,
/s/ J. EVERETT BLUM,
Counsel for Petitioners.

/s/ J. P. WENCHEL,
Counsel for Respondent. [396]

EXHIBIT 1

Belle A. H. Nathan Estate

Hamburger Realty Company

BALANCE SHEET

Assets:

Column A
Book ValueColumn B
Fair Market Value

A. Cash on hand \$10,720.74 and Accounts Receivable \$145.96			\$	10,866.70	\$	10,866.70
B. Stocks:						
1. 275 shares Farmers & Merchants National Bank of Los Angeles, Calif.				71,234.00		106,700.00
2. 678 shares Security- First National Bank of Los Angeles, Calif.				31,477.50		32,967.75
3. 140 units Security Company				None		4,340.00
4. 10 shares Wells Fargo Bank & Trust Co.....				1,855.00		2,925.00
5. 500 shares Angelus Hospital Association				350.00		350.00
6. 13 shares Retail Mer- chants Credit Ass'n.				1,285.00		1,285.00
C. Real Estate:						
1. W. 8th, Broadway & Hill Sts. property under lease to A. Hamburger & Sons, Inc. and May Co.....				1,185,421.44		4,000,000.00
2. #845 So. Broadway property				101,107.46		315,600.00
3. 36/144th interest S. W. Cor. 15th & Hill..				19,164.78		3,000.00
4. 2/10th interest N. E. Cor. 14th Place & Hill				13,205.88		2,000.00

	Column A Book Value	Column B Fair Market Value
5. 6/30th interest S. E. Cor. 14th & Hill Sts. \$	6,880.38	\$ 1,400.00
6. 1/2 interest N. E. Cor. 15th & Hill Sts.....	51,433.30	6,000.00
7. Vallejo, Solano County property	None	None
8. 1404 So. Hill St.	26,692.26	5,000.00
9. 149 W. 14th Place....	39,937.31	6,000.00
10. 1318/22 So. Hill St...	74,111.35	5,800.00
11. S. W. Cor. 15th & Hill Streets	60,398.50	6,000.00
12. Temple Street prop- erty	10,589.35	3,500.00
13. 14th Place & S. Broadway	26,622.61	3,500.00
14. S. E. Cor. 10th & Main Streets	200,006.40	30,000.00
15. S. E. Cor. Ezra St. & Pico Blvd.....	2,468.82	500.00
16. W. 15th btn. Hill & Olive Streets	5,288.32	3,000.00
D. Office Furniture & Fixtures	None	100.00
E. Prepaid taxes and insur- ance	6,547.82	6,547.82
F. Sales contract — Leroy Joseph	250.00	250.00
Total Assets	\$1,947,164.18	\$4,557,632.27
Liabilities:		
A. Accounts Payable	\$ 6,391.90	\$ 6,391.90
B. Federal income and excess profits taxes	70,116.03	70,116.03
C. Note due A. Hamburger & Sons, Inc.	548,220.70	548,220.70
D. Lease rental deposits from lessees	5,750.00	5,750.00
Total Liabilities	\$ 630,478.63	\$ 630,478.63
Net Worth	\$1,316,685.45	\$3,927,153.64

EXHIBIT 2

Belle A. H. Nathan Estate
Hamburger Realty Company

PROFIT & LOSS STATEMENT

Year			
1936	Receipts	\$282,839.06	
	Expenses	85,805.39	
		<hr/>	
		197,033.67	
	Federal Income Tax	27,936.41	\$169,097.26
		<hr/>	
1937	Receipts	\$285,569.43	
	Expenses	80,345.72	
		<hr/>	
		205,223.71	
	Federal Income Tax.....	28,709.47	176,514.24
		<hr/>	
1938	Receipts	\$291,041.44	
	Expenses	82,874.28	
		<hr/>	
		208,167.16	
	Federal Income Tax.....	33,629.85	174,537.31
		<hr/>	
1939	Receipts	\$293,643.30	
	Expenses	80,615.30	
		<hr/>	
		213,028.00	
	Federal Income Tax.....	34,694.30	178,333.70
		<hr/>	
1940	Receipts	\$272,540.06	
	Expenses	77,613.33	
		<hr/>	
		194,926.73	
	Federal Income Tax.....	45,319.37	149,607.36
		<hr/>	

Year			
1941	Receipts	\$294,825.72	
	Expenses	73,272.94	
		<hr/>	
		221,552.78	
	Federal Income Tax.....	70,116.03	\$151,436.75
		<hr/>	
1942	Receipts	\$293,138.32	
	Expenses	73,447.84	
		<hr/>	
		219,690.48	
	Federal Income Tax.....	92,035.28	127,655.20
		<hr/>	
1943	Receipts	\$340,321.88	
	Expenses	93,711.28	
		<hr/>	
		246,610.60	
	Federal Income Tax.....	116,529.99	130,080.61
		<hr/>	

EXHIBIT 3

Belle A. H. Nathan Estate
Hamburger Realty Company

DIVIDENDS DECLARED

Year		
1936—January 6		\$183,082.14
1937—January 7		171,769.75
1938—January 7		176,514.24
—February 17		1,091.32
1939—February 7		174,537.31
—December 13		9,571.18
1940—February 8		176,260.91
—March 7		2,072.79
1941—January 15		149,607.36
1942—March 12		151,436.75
1943—March 15		129,160.76

EXHIBIT 4

Belle A. H. Nathan Estate

A. Hamburger & Sons, Inc.

BALANCE SHEET

Assets:	Column A Book Value	Column B Fair Market Value
A. Cash on hand and in banks	\$ 113,706.56	\$ 113,706.56
B. U. S. Treasury Bonds & Certificates:		
1. \$141,500.00 P. V. Series 1945-7 2¾%.....	139,139.06	152,245.15
Interest	1,134.95	302.67
2. \$100.00 P. V. Series 1955-60 2⅞%	98.50	111.41
Interest .....	.84	.22
3. \$122,000.00 P. V. Series 1955-60 2⅞%.....	120,633.84	135,915.63
Interest	730.73	272.79
4. \$126,150.00 P. V. Series 1943-45 3¼%.....	124,272.81	133,324.78
Interest	854.15	2,027.10
5. \$84,100.00 P. V. Series 1944-46 3¼%.....	82,841.87	89,776.75
Interest	569.43	1,351.40
6. \$100.00 P. V. Series 1944-46 3¼%	100.00	106.75
Interest .....	.68	1.61
7. \$150,000.00 P. V. Series 1947-52 4¼%.....	168,187.50	177,000.00
Interest	1,436.54	3,152.10
C. Notes Receivable of S. W. Levenson	1,500.00	1,500.00
Interest	11.25	None
D. Mortgages & Trust Deeds:		
1. Estate of Belle A. H. Nathan	55,797.61	55,797.61
Interest	None	None
2. Armenian Gethsemane Church	3,000.00	3,000.00
Interest	52.50	20.00

E. Bonds:		Column A Book Value	Column B Fair Market Value
1.	\$100,000.00 P. V. L. A. City High School Dis- trict 4 $\frac{3}{4}$ % 3/1 and 9/1\$	103,815.22}	\$ 103,815.22}
	Interest	1,583.33}	554.10}
2.	\$3,100.00 P.V. Calif. Country Club 7% 5/1 and 11/1	3,050.00}	3,050.00}
	Interest	None}	None}
F. Stocks:			
1.	20 Shares American Tel. & Tel.	2,105.00	3,057.50
2.	1,167 shares Texas Corporation	35,933.88	47,409.38
3.	1,505 shares Union Oil Co. of Calif.	25,812.50	22,575.00
4.	400 shares Inglewood Park Cemetery	16,000.00	30,000.00
5.	1,000 shares Standard Oil Co. of Calif.....	41,375.00	23,000.00
G. Real Estate:			
1.	955 S. Alvarado, Aca- cia Arms	44,798.22	30,000.00
2.	421 E. 7th Street, Stadler Hotel	81,520.78	65,000.00
3.	5320 Olympic Blvd., Meadowbrook Apts....	55,345.66	25,000.00
4.	3123-9 Sunset Blvd., Westerly Terrace	33,175.20	17,500.00
5.	420 N. Coronado Street	20,644.63	15,000.00
6.	440 N. Coronado Street	20,111.59	15,000.00
7.	2311 Nottingham Street	23,959.68	16,500.00
8.	1034-40 W. Temple Street	15,695.49	13,500.00
9.	N. E. Cor. Santa Mon- ica & Serrano	51,636.53	25,000.00
10.	21 Avenue 26, Venice, California	3,703.76	2,500.00

	Column A Book Value	Column B Fair Market Value
11. 4500/10 Santa Monica Blvd.	\$ 30,005.61	\$ 15,000.00
12. 901 Exposition Blvd.	30,902.37	27,500.00
13. 932 S. Mariposa Street	20,313.74	15,000.00
14. 2418-22 Brooklyn Street	20,655.87	18,750.00
15. S. E. Cor. 90th & Broadway	10,502.04	9,500.00
16. Cor. Jefferson & Grand, Warehouse	179,675.79	300,000.00
17. 2165-9 W. Washing- ton Street	25,461.25	15,000.00
18. 423 S. Western Ave- nue	53,254.60	18,000.00
19. 6425 Santa Monica Blvd., Flomar Apts...	63,261.33	50,000.00
20. 1627 Ingraham Street	32,639.24	25,000.00
21. 3800 S. Vermont Ave- nue	52,443.06	43,500.00
22. 1245 W. 49th Street....	3,891.05	2,750.00
23. S. E. Cor. Clinton & Madison Streets	19,589.78	5,000.00
24. Lot 12 and part Lot 5, Sec. 18 Twp. 2, R. 2 W. Riverside County (8,059/10,000ths Inter- est)	1,227.29	500.00
25. 8/30th interest 1402 S. Hill Street	15,099.43	1,850.00
26. 2/10th interest N. E. Cor. 14th Place & Hill St.-	11,113.71	2,000.00
27. 5/144th interest S. W. Cor. 15th & Hill Sts...	3,022.72	425.00
28. 1/2 interest N. E. Cor. 15th & Hill Streets....	48,318.71	6,000.00
29. 1235 So. Hill Street..	47,933.87	6,400.00
H. 104.167 Shares Hamburger Realty Co.	382,525.73	.....

	Column A Book Value	Column B Fair Market Value
I. Due from Affiliated Corporations:		
1. David A. Hamburger Corporation @ 2% (1/1/38)	\$ 560,000.00	\$ 420,000.00
Interest	6,096.49	1,026.76
2. David A. Hamburger Corporation @ 2% (12/13/39)	12,000.00	12,000.00
Interest	259.00	80.00
3. Hamburger Realty Co. 2% (12/31/40) ..	548,220.70	548,220.70
Interest	None	None
4. David A. Hamburger Corpor'n. — open account	161,299.29	161,299.29
J. Due from Officers and Stockholders:		
1. Evelyn Hamburger \$74,052.60 & \$3,988.64	102,725.44	78,041.24
2. Estate of Belle A. H. Nathan \$49,520.89 and \$11,209.29	77,237.14	60,730.18
3. Jennie H. Marx \$113,174.55	150,899.40	113,174.55
4. Estate of M. A. Hamburger \$409,186.14.....	409,186.14	409,186.14
Interest	1,977.70	2,341.36
K. Open Accounts— Stockholders:		
1. Evelyn Hamburger	94,972.06	94,972.06
2. Jennie H. Marx	94,502.53	94,502.53
3. Estate of M. A. Hamburger	87,504.20	87,504.20
4. Estate of Belle A. H. Nathan	45,560.83	45,560.83
L. Prepaid taxes, prepaid insurance and prepaid rent commissions	11,744.01	11,744.01
Total Assets	\$4,810,357.31	\$4,030,632.58

	Column A Book Value	Column B Fair Market Value
Liabilities:		
A. Current Liabilities	\$ 444,244.98	\$ 444,244.98
B. Federal Income and Excess Profits Taxes	96,489.07	96,489.07
C. Lease rental deposits from lessees	14,382.50	14,382.50
	<hr/>	<hr/>
Total Liabilities	\$ 555,116.55	\$ 555,116.55
Net Worth	\$4,255,240.76	\$3,475,516.03
	<hr/> <hr/>	<hr/> <hr/>

Under the terms of the lease between A. Hamburger & Sons, Inc. and The May Department Stores Co. dated March 30, 1923 (Exhibit 7), A. Hamburger & Sons, Inc. was entitled to receive, during the period commencing November 1, 1941 and ended December 31, 1942, the sum of \$604,-078.16 and during this same period A. Hamburger & Sons, Inc. was obligated to pay to the Hamburger Realty Co. as rental for the same property (Paragraph V of this Stipulation) the sum of \$291,666.66. The excess of the amount that A. Hamburger & Sons, Inc. was entitled to receive from The May Department Stores Company over and above the amount A. Hamburger & Sons was required to pay to the Hamburger Realty Co. during the period commencing November 1, 1941 and ended December 31, 1942, was \$312,411.49 which, when discounted at 6% (.9433) to the date of receipt, had a value at October 13, 1941 of \$394,-697.77 and, when discounted at 7% to the date of receipt, had a value at October 13, 1941 of \$294,-218.75. This sum is not, nor is any portion thereof, carried as an asset, and is not reflected in the above Balance Sheet.

EXHIBIT 5

Belle A. H. Nathan Estate

A. Hamburger & Sons, Inc.

PROFIT & LOSS STATEMENT

Year			
1936	Receipts	\$397,685.74	
	Expenses	59,928.64	
		<hr/>	
		337,757.10	
	Federal Income Tax.....	41,360.14	\$296,396.96
		<hr/>	
1937	Receipts	\$445,422.81	
	Expenses	66,986.65	
		<hr/>	
		378,436.16	
	Federal Income Tax	44,051.15	334,385.01
		<hr/>	
1938	Receipts	\$416,682.57	
	Expenses	60,718.16	
		<hr/>	
		355,964.41	
	Federal Income Tax.....	50,694.87	305,269.54
		<hr/>	
1939	Receipts	\$416,551.04	
	Expenses	62,180.38	
		<hr/>	
		354,370.66	
	Federal Income Tax.....	50,511.86	303,858.80
		<hr/>	
1940	Receipts	406,941.05	
	Expenses	60,936.33	
		<hr/>	
		346,004.72	
	Federal Income Tax.....	71,493.34	274,511.38
		<hr/>	

Year			
1941	Receipts	\$410,128.89	
	Expenses	62,116.66	
		<hr/>	
		348,012.23	
	Federal Income Tax.....	96,489.07	\$251,523.16
1942	Receipts	\$417,465.74	
	Expenses	60,998.51	
		<hr/>	
		356,467.23	
	Federal Income Tax.....	135,911.53	220,555.70
1943	Receipts	\$154,476.52	
	Expenses	53,730.81	
		<hr/>	
		100,745.71	
	Federal Income Tax.....	26,108.48	74,637.23

EXHIBIT 6

Belle A. H. Nathan Estate

A. Hamburger & Sons, Inc.

Dividends Declared

Year		
1936—	March 24	\$295,912.43
1937—	January 7	262,478.08
	—January 27	50,734.00
	—December 29	6,350.00
1938—	January 7	276,997.91
	—February 17	41,615.44
1939—	February 7	305,269.54
1940—	February 8	300,579.11
	—March 7	3,946.97
1941—	January 15	274,511.38
1942—	March 12	251,523.16
1943—	March 15	222,687.57

EXHIBIT 7

This Indenture of sublease made and entered into at Los Angeles, California, this 30th day of March, 1923, by and between A. Hamburger & Sons, Incorporated, a corporation organized and existing under the laws of the State of California, party of the first part, hereinafter designated as Lessor, and The May Department Stores Company, a corporation organized and existing under the laws of the State of New York, party of the second part, hereinafter designated as Lessee.

Witnesseth:

That said Lessor for and in consideration of the covenants and agreements hereinafter contained to be kept and performed by the Lessee, and in consideration of the rights herein reserved, does hereby lease and demise unto the said Lessee, and the said Lessee hereby takes and accepts from said Lessor all that certain real property with the building and appurtenances thereunto belonging, including the boilers, heating equipment and machinery, being situate in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:

Lot C of re-subdivision of the portion of Block 52 of the Huber Tract, as per map recorded in Book 12, Page 1, of Maps in the office of the County Recorder of Los Angeles County.

Also Lot 20 in Block 52 of the Huber Tract in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 2, Page 280, Miscellaneous Records of said County.

This Lease is made for the term and upon the conditions, covenants and agreements hereinafter expressed; and said Lessor for itself, its successors and assigns, and said Lessee for itself, its successors and assigns, do hereby respectively agree to keep, observe and perform each and all of the conditions, provisions and agreements hereinafter provided to be kept, observed and performed by said Lessor and said Lessee respectively, to-wit:

I. Term

The term of this sublease shall be twenty (20) years, commencing on the first day of January, 1923, and ending on the 31st day of December, 1942. [405]

II. Rent

(a) The Lessee does hereby covenant and agree to pay to Lessor as rental for the said premises for the term hereof the sum of Ten Million Three Hundred Fifty-five Thousand Six Hundred Twenty-five Dollars and Six Cents in monthly installments, payable in advance on the first day of each and every calendar month during the term hereof, said monthly installments to be in the sum of Forty-three Thousand One Hundred Forty-eight Dollars and Forty-four Cents each, commencing on the first day of January, 1923, as aforesaid.

(b) Receipt of the sum of One Hundred Twenty-nine Thousand Four Hundred Forty-five Dollars and Thirty-two cents being the monthly installments for the months of January, February and March, 1923, is hereby acknowledged.

III. Taxes and Assessments

(a) As a further consideration for the leasing and demising, as aforesaid, of the said premises to the said Lessee, the said Lessee covenants and agrees to bear, pay and discharge in addition to the rents heretofore reserved herein, all taxes, assessments, levies, rates, duties, tolls, imposts and charges of every kind, nature and description, whether general or special, ordinary or extraordinary, which may at any time, or from time to time, during the term hereof, by or according to any law or governmental, legal, political or military order or authority whatsoever, directly or indirectly, be taxed, charged, levied, assessed or imposed upon or against, or which shall be or may be or become a lien upon this sublease, or upon all or any part of the land, building, or premises hereby leased, or any building, improvement or structure now located, or that may be hereafter located or built thereon, or any estate, right, title or interest of the Lessor and of the Lessee, or either of them, or of their respective successors or assigns in or to said demised premises, or said building, improvements or structure; including also all water rates, gas, electric, fuel and power rates which may be charged against said

premises during the term hereof; provided, however, that if any of the following obligations or liabilities shall be or become such lien, the Lessee shall not be required to pay or discharge the same, under the terms of this lease, to-wit:

1. Any corporation franchise tax or corporation license fees which may be levied upon or against the Lessor.

2. Any tax which may be levied by the United States of America, or the State of California, upon or against the income, profits or capital stock of the Lessor, or any inheritance tax.

3. Any taxes which may be levied upon or against [406] any real property of the Lessor other than the real property described in this lease.

It is understood and agreed that the first taxes to be paid by said Lessee shall be the second half of the City and County taxes for the fiscal year 1922-23. The said Lessee further covenants and agrees to deliver to Lessor, tax receipts of all taxes, assessments and charges hereinbefore referred to, showing the payment of all taxes and assessments of every kind, nature and description whatsoever that shall have been levied or imposed upon said premises, or any part thereof, during the term hereof.

(b) The land, buildings and improvements covered and affected by this lease shall always be

assessed for the purposes of taxation in the name of the Lessor, and Lessee agrees, at the proper times, to make and file the necessary statement with the proper taxation authorities so that hereafter the whole of the premises hereby demised will be assessed in the name of said Lessor during the entire period of the term hereof.

IV. Building

It is understood and agreed that said Lessee has examined and knows the contents and condition of the premises herein demised, and it is hereby acknowledged that no statements, warranties or representations of any kind whatsoever regarding the present or future condition of said premises have been made by Lessor to Lessee except as are herein specifically set forth, and it is agreed that said premises are now in good condition and repair, and said Lessee hereby accepts the same in their present condition.

V. Upkeep and Repair

It is further understood and agreed that Lessor is not bound to keep said premises in repair, and that said Lessee shall make all repairs in and about said premises, and said Lessee agrees to keep the same in good condition and repair during the entire term hereof, and at the end of the term hereof, or at any sooner termination, to quit, surrender and deliver the possession of the herein demised premises to said Lessor in as good condition as exists at the date hereof, ordinary use and damages by the ele-

ments excepted. In case Lessee fails to keep said premises in repair, Lessor shall have the right to enter in or upon said demised premises, or to make any and all repairs necessary or proper to protect or preserve said premises, and all said repairs so made shall be at the expense of said Lessee, and said Lessee hereby agrees to repay to said Lessor any expense so incurred upon the first day of the calendar month succeeding the making of said repairs. [407]

VI. Use of Premises and Indemnity

(a) Lessee hereby covenants and agrees that said premises, and each and every part thereof, shall be used solely and exclusively as and for a department store, and all businesses usually carried on in connection therewith, and for no other purposes whatsoever. It is understood and agreed however that, due to the shifting of business or of the shopping center in Los Angeles, or to any other local conditions, it may be impossible or impractical to conduct a department store at a profit in the herein demised premises, in which event Lessee, or its assigns under valid assignment, may use said premises for any first class lawful commercial use as distinguished from special or limited use, such as theaters, hotels and similar uses, and so long as said use is of such a character as not to injure the reputation of the premises or the sale value or rental value thereof. Lessee covenants and agrees that it will not use, or permit any other person or persons to use said demised premises, or any part

thereof, in any manner or for any purpose in violation of any of the laws of the United States or of the State of California, or of any Ordinance of the City of Los Angeles, or of any rule or regulation of any Board, Commission or other Municipal or Governmental agency affecting said premises or the use thereof; and not to use said premises, or any part thereof, so as to constitute a public nuisance, or a nuisance to the owners of adjoining or neighboring property, or to maintain any nuisance on said premises, or for any other use whatsoever that would tend to injure the reputation or rental or other value of said premises; that it will not use said premises, or any part thereof, for any purpose or in any manner, or do or permit to be done, or suffer to be done, any act or thing whatsoever that will violate any policy of insurance, or or suspend or render inoperative any policy of fire or rent insurance now or hereafter, during the term hereof, carried on the whole or any part of said demised premises, and particularly that it will not keep, or suffer or permit to be kept, on said demised premises any gasoline, distillate or other petroleum product for use for heating, lighting, or other purpose, or that may be extra hazardous, without first obtaining the written consent of all insurance companies carrying fire or rent insurance upon said premises, or any part thereof. It is further agreed that Lessee shall conform to all laws, ordinances, rules and regulations affecting said premises, and the sidewalks and streets and alleys in front of or around said premises; that it will keep and save

harmless said Lessor from any damage or penalty or charges imposed for violation of any of said laws occasioned by the use, misuse or neglect of said Lessee, or of any tenant or tenants holding under it, and of all other persons occupying said premises.

(b) It is further agreed that said Lessor shall not be liable for any damage of any kind occasioned by [408] failure to keep said premises in repair during the term hereof, and shall not be liable to the said Lessee, or to any one else, for or on account of any damage or injury done or occasioned by or from the use, misuse or neglect of the herein demised premises, or from the condition of said premises or the plumbing, gas, water, steam or other pipes or sewage, or in any other way or manner growing out of the present, past or future condition of said premises, nor on account of the elevators, escalators, engines or machinery of said building, or for accidents, injuries or damages in or about the portion thereof, or otherwise; and it is further agreed that said Lessee will indemnify and save and keep harmless the Lessor against and from any loss, cost, damage or expense arising out of any action or other occurrence causing injury to any person or property whatsoever due directly or indirectly to the use of said premises, or any part thereof, by said Lessee or any person or persons holding under it or in its employment, or otherwise using said premises, including damage or injury to any person or property occurring in the streets or on the

sidewalks due directly or indirectly to the use of said premises, and to carry adequate accident insurance covering the same.

VII. Improvements or Additions to the Building

(a) Lessee is hereby given the right to erect additional stories on the building hereby demised so long as the erection of said additional stories are not in violation of any building ordinances or regulations of the City of Los Angeles, provided that before the erection of such additional stories Lessee shall first obtain the written approval of the Lessor, or of the architect of Lessor, of the plans and specifications for such additional stories, provided, however, that such approval shall not be unreasonably withheld. Such additional stories and any other alterations in, or additions to, the building now standing on said premises shall be entirely at Lessee's own cost and expense, and any such additional stories, additions or alterations shall immediately be and become a part of the realty, and shall be and remain the property of the Lessor, but any trade fixtures placed by Lessee in or about said premises at any time during the term hereof may be removed therefrom by Lessee at or prior to the expiration of the term hereof unless said Lessee be in default in any of the terms hereof, upon condition, however, that Lessee shall immediately repair any and all damage caused to said demised premises, or any part thereof, by the removal of any such trade fixtures.

(b) Any changes, repairs, alterations or improvements in the herein demised building other than the erection of additional stories thereon may be made by Lessee at its own cost without the approval of said Lessor, upon the express restriction and condition, however, that such changes, repairs, alterations or improvements shall be of such a character as not to weaken or impair the structural strength of said building, and upon the further restriction and condition that such changes, repairs, alterations or improvements will not render said building improper for department store uses, or for such [409] other first class commercial uses as, at the time of the making thereof, Lessee may be permitted to use said premises for, under the condition specified in Paragraph VI hereof.

VIII. Mechanics' and Other Liens

(a) All of the provisions of this lease relating to mechanics' or other liens, and all of the obligations of Lessee with reference thereto, shall apply not only to the building now standing upon the demised premises, but to every substitute therefor and replacement thereon, and to any and all repairs, additions, restorations and work that may be **done or caused to be done** at any time by Lessee in or upon the demised premises, or any building or structure standing thereon.

Lessee covenants and agrees to keep the demised premises and all buildings thereon, and every part thereof and interest therein, free and clear of me-

chanics' liens and other liens for labor, services, supplies, equipment or materials, and agrees that at all times it will fully pay and discharge and wholly protect and save harmless Lessor, and the right, title and interest of Lessor, and its successors and assigns in and to said premises, and the whole thereof, from any and all demands or claims which may or could ripen into such liens, and from any such liens, and from any attorneys' fees and costs and expenses which may be incurred by Lessor or by Lessee by reason of or on account of any such liens or claims, or the assertion or filing thereof. Should Lessee fail to pay off and fully discharge any such liens or claims within thirty (30) days after the same have attached to said property, or to any interest therein, Lessor at its option may pay, adjust or compromise the same, or any portion thereof, in any such manner as it may elect, and in so doing Lessor shall be and remain the sole judge of the legality of such lien or claim, and the validity thereof, to the full amount of such payment, adjustment or compromise provided, however, that if Lessee desires to do so, it may contest any such claim or lien upon giving written notice to Lessor within said period of thirty (30) days of its intention so to do. In the event that said contest be made and litigation should ensue, then within ten (10) days after the entry of any final judgment which may be recovered in any such action against said Lessor or against said Lessee, or either of them, or against said premises or against any part thereof,

or any interest therein, Lessee shall pay and fully discharge said judgment; and in the event that Lessee fails or neglects so to do, Lessor may make such payment, or adjust or compromise such claim or judgment in such manner as it may elect. In the event of any such litigation at all times after entry of any judgment, and pending the final determination of such litigation, Lessee by proper orders of Court or by deposit of money, or by a good and sufficient undertaking, or otherwise, as may be required or [410] permitted by law, shall wholly stay and keep wholly stayed any execution of any such judgment, and of every part thereof, that may be rendered or entered in said litigation against said Lessor or said Lessee, or against any estate or interest of either of them in or to said leased premises or any buildings or improvements thereon; and if such stay of execution should not be accomplished, or if the same shall not be preserved at all times as aforesaid, Lessor at any time after the ten (10) days' written notice to the Lessee of its intention so to do, may compromise and cause any judgment to be satisfied and discharged upon such terms and conditions as the Lessor may deem fit.

(b) In any event whatsoever Lessor shall have the right at its option to redeem the leased premises and the buildings and improvements thereon, or any part thereof, or any and every estate, right, title, and interest therein, from any and all sale under any judgement or any foreclosure of any mechanics'

lien or lien of like nature, without any notice whatsoever to said Lessee.

Lessee agrees to pay to Lessor and to reimburse it for all moneys which it may pay out in discharge of any such claims, liens or judgment, or for any redemption from any said sale, and for all reasonable attorneys' fees, costs and expenses which may be incurred by Lessor by reason or on account of the same; and all such sums of money shall be repaid by Lessee to Lessor on or before the first day of the calendar month ensuing after the same shall have been expended by Lessor.

(c) The payment by Lessor of any such claim, lien, or judgment in the manner above described, or the payment and making of any such redemption in the manner above described, shall, as between the parties hereto, be deemed to be conclusive evidence of the validity of such claim, lien, judgment or sale, and of the regularity of all acts and proceedings relative thereto to the extent of the full amount expended by the Lessor therein or therefor.

(d) Lessee shall give notice promptly and in writing to Lessor as soon as it receives any information of any claim, lien or suit affecting the premises hereby demised, or any part thereof, or any interest therein.

(e) It is agreed between the parties hereto, and notice to whom it may concern is hereby given by Lessor, that Lessor shall not, nor shall its successors or assigns, nor shall any part of the premises herein demised, or of any interest therein or thereto, be

or become liable for or on account of any lien or liens, or claim or claims, that may be asserted or filed for or on account of the erection, construction, addition to or repair of any part of said premises, or for or on account of any services, work, supplies or materials that may at any time be done or furnished in and upon or about the demised premises, or any part thereof. [411]

(f) Lessor or its agents shall have the right to go upon the demised premises at any and all times, and to inspect said premises, and each and every part thereof, being altered, repaired, erected, constructed or in course of construction, and to serve or post and keep posted thereon, or on any part thereof, any notices provided for by Section 1192 of the Code of Civil Procedure of the State of California, or any notice or notices that may at any time be proper, or that may be required or permitted by any other law.

(g) Lessee agrees that it will not permit any work of construction, addition, alteration or repair, or any other work that might cause any claim or lien to attach to said premises, or any part thereof, or any interest therein, to be commenced until and unless it has given written notice to Lessor of the contemplated commencement of such work, in order that Lessor may be afforded an opportunity to post the notices referred to in this Paragraph (f) hereof.

IX. Insurance

(a) Lessee agrees to, during the entire of the term hereof, maintain fire insurance upon the build-

ing now located on said demised premises, or which may hereafter be constructed upon or added to, or substituted for said building, and upon all appurtenances belonging thereto, in an ammount of not less than seventy (70) per cent of the actual value at the time such insurance is written on such building and all such additions thereto or substitutes therefor.

(b) Policies of insurance shall be so issued as to cover and insure all of the several interests of the owner of the premises herein demised, the holder of any mortgage or deed of trust against said premises, the Lessor and Lessee, and shall be so written that in case of loss or damage the proceeds of such insurance shall be and shall become payable to said parties as their interests may appear.

(c) Lessee agrees that it will, at its own cost and expense at all times during the term hereof, provide promptly and punctually pay all premiums demanded for all and any insurance policies whatsoever contemplated in this lease, and should Lessee fail to pay therefor, or fail to insure said premises, as herein provided, said Lessor shall have the right to insure the same in any company or companies that it may deem fit, and all said insurance shall be at the expense of said Lessee, and Lessee agrees to repay the cost thereof to Lessor all sums so expended on the first day of the calendar month ensuing after the date of such payment; and Lessee further agrees to maintain in full force and effect during the term hereof, any and every form of insurance that may

be required by any law, ordinance or governmental regulation to be carried or maintained by the owner of the demised premises, and also to require every [412] contractual performance and any work thereon under or by agreement with or permission of Lessee, to provide and maintain all insurance of any kind that may be required of it to be carried by it against injury to its employees, or against injury to other persons, or otherwise, and Lessee agrees to indemnify Lessor against, and save harmless from any liability, claim or expense, including costs and reasonable attorneys' fees which might accrue by reason of the failure of Lessee or of any of the other persons hereinbefore designated to provide and maintain such insurance.

In particular Lessee agrees that at all times during the term hereof it will maintain in full force and effect such policy or policies of insurance in such amounts and with such companies as may be approved by Lessor, insuring Lessor against claims of any nature whatsoever to persons or property arising out of or resulting from any accident occurring in or about, or by reason of the operation or construction of any elevator, escalator, boiler or other machinery or equipment now or hereafter in or about said premises. And Lessee agrees to hold Lessor harmless from any loss, claim or expenses whatsoever arising out of, or resulting from, the construction, maintenance or operation of any such elevator, escalator, boiler or other machinery or equipment, including the expense of opposing or de-

fending any claim that may be made, or any suit that may be instituted against Lessor, by reason thereof.

(d) Lessee agrees that it will not enter into any contract for the reconstruction of the building now standing upon said premises, or for the addition to or alteration or repair of such building until and unless the contractor or contractors undertaking such work shall be fully insured in an insurance carrier satisfactory to Lessor against any claim under the employer's liability and workmen's compensation act of the State of California, or any other law or statute of any other jurisdiction which may then be in force arising out of or resulting from any injury to or death of any person employed in or about the work covered by said contract.

(e) Lessee agrees to carry and maintain adequate riot or civil commotion insurance and public liability or accident insurance of all kinds, insuring against loss, damage or injury to person or property occurring on the premises or any part thereof or in the streets or on the sidewalks or alleys surrounding said premises due directly or indirectly in any manner whatsoever to the use of said premises.

(f) All policies of insurance affecting the Lessor herein or the Lessor's interest hereunder, shall be delivered to Lessor, it being understood that fire insurance policies covering Lessee's stock of merchandise, fixtures, furniture and the like, and compensation insurance and accident and liability insurance and insurance similar in nature thereto, need not

be delivered to the Lessor, but shall be retained by the Lessee. All such policies of insurance to be delivered to the Lessor hereunder shall be in companies acceptable to said Lessor. [413]

X. Fire and Earthquake

(a) It is understood and agreed that the department store building now in existence and erected upon the herein demised premises consists of six stories and a basement. If at any time during the term hereof said building—to-wit, said building so consisting of six stories and a basement, without the addition thereto of any additional stories thereon—now standing upon the premises or any part thereof or any substitute therefor or addition thereto, be wholly or partially destroyed by fire, Lessor agrees to immediately reconstruct the same or make any necessary repairs thereon so as to place said building, or any part thereof so damaged or destroyed, as near as may be possible in the same condition as existed at the time of such destruction, damage or injury. The proceeds of any and all fire insurance policies shall be turned over to and used by Lessor for such reconstruction or repairs.

And whereas, under the provisions of paragraph VII hereof, Lessee is given the privilege of erecting an additional story or stories on the building now standing on the herein demised premises, it is now therefore, hereby agreed that in the event that at the time of such destruction or injury by fire there shall have been erected by Lessee an additional story or stories on the building hereby demised and such

additional story or stories shall be destroyed or injured by fire, Lessee is hereby given the privilege and option, either to reconstruct or repair such additional story or stories so injured or destroyed so as to place the same, as near as may be practicable in the same condition as existed at the time of such destruction or injury—and the proceeds of all fire insurance policies covering such additional story or stories shall be turned over to and used by Lessee for such reconstruction or repairs and any money that may be required to thus reconstruct or repair said additional story or stories in excess of the proceeds of said fire insurance policies covering the same, shall be expended for such purpose by Lessee out of its own funds,—or Lessee, if it so elects, may not reconstruct or repair such additional story or stories, but may retain the proceeds of all fire insurance policies covering the same and such proceeds shall be and belong to said Lessee—it being understood, however, in such latter event that the said building shall be completely roofed at the sole cost and expense of said Lessee.

(b) Whereas, Lessee is not obligated, under the terms of this lease to carry earthquake insurance on the building herein demised or any part thereof; now, [414] therefore, it is agreed, that in the event of any destruction or injury of the building now standing upon the herein demised premises or any part thereof or any substitute therefor, or addition thereto, by earthquake Lessee shall, at its own cost and expense, immediately repair or reconstruct

or make the necessary repairs thereon so as to place said building in the same condition as existed at the time of the execution of this lease.

(c) In no event shall such destruction or injury by such fire or earthquake, as aforesaid, be deemed to be a termination of this lease, but said lease shall continue in full force and effect, subject to partial suspension or diminution for the rent of said premises as hereinafter more fully defined, based upon the amount of time consumed in making said repairs and based upon the amount of space of which Lessee is deprived during the time when said repairs are being made, provided, however, that no suspension or diminution of rent shall be made on account of depriving Lessee of space in any additional stories that may be erected by Lessee upon the building now occupying the herein demised premises, it being understood that Lessee in the erection of said additional stories assumes the entire risk and responsibility therein and thereby. For the purpose of determining the proper amount of rent to be suspended or diminished, the average monthly rental shall be taken at the rate of Twenty Five Thousand Dollars (\$25,000) per month, but in any event no suspension or diminution of rent shall be made except on said basis of Twenty Five Thousand Dollars (\$25,000) per month, and Lessee shall at all times continue to pay monthly in advance on the first day of each and every calendar month the excess existing between the pro rata allowance of said sum of Twenty Five Thousand Dollars (\$25,000) and the

original monthly rental provided to be paid hereunder, to-wit: the sum of Forty three thousand one hundred forty eight dollars and forty four cents.

(d) No restoration, alteration or repair shall be required which, at the time, shall be contrary to any building ordinance or law of the City of Los Angeles, County of Los Angeles, or State of California.

(e) In no event shall Lessee be entitled to compensation or damages for or on account of or from any matter or thing arising out of, or resulting from, such destruction or damage, or for any annoyance or confusion in reconstructing the same, or making any repairs thereto, or otherwise, except [415] as expressly set forth in this Paragraph X.

(f) With reference to the maintenance of fire insurance by Lessee on the building herein demised, it is understood and agreed that if said Lessee should fail or neglect to maintain fire insurance on said building in the manner as hereinbefore provided for in Paragraph IX, and provided Lessor shall notify Lessee in writing to that effect, then and in that event Lessor shall not be obliged to make any repairs or improvements whatsoever, but the proceeds of any insurance policies shall be deposited for the use of Lessee, and Lessee shall then therewith reconstruct or repair said building in such a manner as to place the same in as good condition as it existed at the time of the execution of this lease, paying and bearing whatever excess may be required to effect such reconstruction over and above the amount of the proceeds of such insurance policies.

(g) In determining such diminution of rent based on loss of space, due consideration shall be given to the beneficial use and value of the space of which Lessee shall be so deprived.

And it is agreed that if the said parties cannot agree upon the amount of such diminution, then each shall, within ten (10) days after the occurrence of said casualty, appoint an arbitrator and if such two arbitrators cannot agree, they shall, within ten days thereafter, appoint a third arbitrator, and the decision of any two of said arbitrators shall be final and fix the amount of diminution to be allowed from said rent for such loss of beneficial use. Said Lessee shall, however, during said period pay the full rent called for by said Lease and shall receive credit for the amount that shall be so awarded, upon the next rental payment or payments that may become due after such award.

XI. Notices and Demands

It is further agreed that whenever any notice or demand is required to be, or may be given, by either of the parties hereto, to the other or to their respective successors or assigns, service of such notices or demands shall in each and every instance be complete as to and upon said Lessor, its successors or assigns, by personally serving such notice or demand upon any officer of said Lessor, or by posting the same in the United States mails, postage prepaid thereon, addressed to said Lessor at such address as may from time to time be designated by Lessor;

and as to and upon said Lessee, its successors and assigns, then holding under and by valid assignment, by personally serving such notice or demand upon any officer of said Lessee, or by posting the same in the United States mails, postage prepaid thereon, addressed to said Lessee at No. 801 South Broadway, Los Angeles, California, or such other address in the City of Los Angeles as may be designated by Lessee. [416]

XII. Assignments and Subleases.

(a) No assignment of this lease or of any interest therein by the Lessee, and no sublease of any interest by the Lessee shall be valid except upon the following terms and conditions, and no others, to wit:

Said Lessee is hereby given the right to make such subleases as are usual and customary in and about the operation of department stores for the purpose of establishing departments and concessions therein upon the condition, however, that at all times during the continuation of this lease—and so long as Lessee shall not have made any valid assignment thereof—said Lessee shall remain in the major possession and occupancy of said premises. It is understood and agreed that where—as provided for in Paragraph VI hereof—said premises are permitted to be used for other than department store uses, Lessee is given the right to sublet all or any part thereof for any of the uses specified in said Paragraph VI.

(b) In the event of any assignment of this lease in the manner as hereinafter provided, any such assignee of said Lessee is hereby given the same privileges with reference to subletting as are herein given to said Lessee, and in the event of any such assignment, said assignee shall remain in the major possession and occupancy of said premises.

(c) Said Lessee is hereby given the right to assign this lease to any corporation or to any person of the Caucasian race of good moral character and good financial responsibility; and said assignment shall not be valid until and unless said assignee shall assume and agree in writing for the use and benefit of the Lessor, to carry out, perform and be bound by each and all of the Lessee's agreements herein contained.

No interest of Lessee or of its successors or assigns, or of any of them, in this lease, or any interest therein, or in the demised premises, or any part thereof, shall be assignable or transferable, or assigned or transferred, by bankruptcy or insolvency or other similar operation of law. In no event shall this lease, or any interest therein, be or be deemed to be an asset of the estate of said Lessee, or its successors or assigns, or any of them, should they or any of them be adjudicated bankrupt or insolvent.

(d) Lessee agrees that it will not suffer or permit this lease, or any interest therein, or the demised premises or any part thereof, or any of the property of it, kept or allowed to be kept, or located in or

about the demised premises, to be held, kept, possessed, attached, levied or liened upon for a longer period than ten (10) days under any writ of attachment, writ of execution, or any other process or any other matter growing out of a suit or proceeding in [417] law or equity. Nor, will they, or any of them, commit any act of bankruptcy, or permit any adjudication of bankruptcy.

(e) No assignment whatever shall be made or attempted or suffered to be made by Lessee, its successors or assigns, if at the time of such attempted assignment said Lessee, or its successors or assigns, attempting to make such assignment be in default in the performance of any of its agreements herein contained.

(f) No assignment shall be made or effected except by an instrument in writing by the assignor and assignee, and an original duplicate of such assignment by the Lessee and the acceptance thereof by the assignee shall be furnished to Lessor before such assignment shall become valid.

(g) Any assignment purported or attempted to be made otherwise than in accordance with the provisions of this lease shall be voidable at the option of the Lessor, and any attempt to make or suffer or permit such assignment by Lessee, its successors or assigns, or to fail to keep all of the terms and agreements of this Paragraph XII, shall be and be deemed to be at the option of Lessor a breach of the conditions of this lease, and subject to all of the rights of Lessor to terminate the same as herein provided.

(h) No subletting or assignment shall in any manner whatsoever release the Lessee hereunder from any or all of the obligations by it to be performed under this lease, including the payment of the rentals provided to be paid hereunder and the faithful performance of all of the other terms and conditions hereof.

XIII. Forfeiture For Default.

(a) Lessor shall not be required to give any notice of default or demand for possession, or any other demand or notice other than as herein provided. All sub-tenants or other persons claiming, or in possession of all or any part of the demised premises, under or through Lessee, shall be deemed to have waived any notice of default or demand of any kind whatsoever.

(b) In the event of any action in law or in equity to collect any rent which may become due hereunder, or to enforce any of the terms or conditions of this lease, or to recover damages for any breach thereof, or to terminate this lease by reason of any default on the part of Lessee, or to recover possession of the demised premises—Lessee will pay to Lessor if Lessor recover judgment against Lessee, such sum as may be judged reasonable as Lessor's attorneys' fees therein, and such additional fee may be included in and be a part of any judgment which may be so rendered.

(c) No waiver of any breach or any term or condition of this lease shall be construed as a waiver by Lessor of any subsequent breach of the same or of any other term or condition. [418]

(d) The several rights, remedies, elections, powers and options of Lessor contained in this lease shall be construed as cumulative and no one of them is exclusive of the others, nor of any other right or priority now or hereafter allowed by law.

(e) It is further understood and agreed by and between the parties hereto that the right given in this lease to the said Lessor to collect the rent that may be due under the terms of this lease by any proceedings under the same, or the right to collect any additional rent, moneys or payments due under the terms of this lease by any proceedings under the same, or the right herein given to the Lessor to enforce any of the terms and provisions of this lease shall not in any way affect the right of the Lessor to declare at its option this lease, or any sublease thereunder, or assignment or other transfer thereof void and terminated—and the term hereby created or any assignment or sublease thereunder or other transfer thereunder ended.

(f) All sums of money which are to be paid or repaid by Lessee to Lessor under any of the provisions of this lease shall be paid in gold coin of the United States of America of the present standard weight and fineness, and shall become due and payable unless otherwise specified herein with specific reference to a particular payment or class of payments immediately when any advance is made, or expense incurred by Lessor for any of the matters or things or under any of the foregoing provisions of this lease.

XIV. Ownership of Building.

Lessor represents that the premises and the building located thereon is owned in fee simple by the Hamburger Realty Company, and that said premises are free and clear of all incumbrances excepting only that there exists against the same a Deed of Trust in the sum of approximately One Million Six Hundred Sixty Six Thousand Dollars (\$1,666,000). This lease is made subject to said deed of trust and subject to a certain lease by and between A. Hamburger & Sons, Incorporated as Lessor to the United States of America, as Lessee, recorded in Book 109, page 117 of Leases, records of Los Angeles County, to which record reference is hereby made for full particulars.

XV. Time Is Essence of This Lease.

Time is expressly made the essence of this agreement, including particularly with reference to the prompt payment and discharge of all rents, claims, liens, taxes, assessments and like obligations.

In the event of a default by Lessee in any of the terms, covenants or conditions in this lease provided by it to be performed, Lessor shall serve written notice upon Lessee of such default, and Lessee shall have sixty (60) days thereafter within which to cure or correct such default. It is understood and agreed, however, that Lessee shall not be given said period of sixty (60) days within which to cure any default, which default is not subject to being cured or corrected. Interest on delayed rentals shall be

paid at the rate of seven per cent (7%) per annum and shall be paid on the next rent day succeeding such default. [419]

XVI. Miscellaneous Covenants.

(a) Should the Lessor elect to reenter and take possession of said premises under any one or more of the conditions described in this lease, said Lessor may, at its option, either terminate this lease and recover from the Lessee all damages caused by breach thereof by said Lessee, including all reasonable attorneys' fees which Lessor may be required to incur in recovering possession of said premises and in collecting said damages, or Lessor may, without terminating this lease, relet said premises or any part thereof for all or any part of the remainder of said term to a tenant or tenants satisfactory to it and at such rental as it may with reasonable diligence be able to secure, and should such rental be less than that hereinbefore agreed to be paid by Lessee, Lessee agrees to reimburse Lessor for any reasonable expenses which may be incurred by Lessor in reletting said premises and pay said Lessor monthly in advance upon the day of each calendar month when the rental herein provided to be paid becomes due and payable, the amount of any such deficiency in said rent. No reentry of said premises by Lessor as herein provided, shall be considered as an election on its part to terminate this lease unless written notice to that effect is delivered to Lessee.

(b) In no event, however, shall a termination or cancellation of this lease for any cause whatsoever, whether the partial or complete destruction of said premises—or for any other cause—and whether for any fault or default of Lessor, or otherwise—relieve Lessee from the payment of the rental herein reserved as to any amount of such rental in excess of the sum of Twenty Five Thousand Dollars, (\$25,000) per month, it being distinctly understood and agreed that if, for any reason at all, this lease is cancelled and terminated, Lessee shall continue during the remainder of the term hereof, to pay to Lessor monthly in advance on the first day of each and every calendar month, the sum of Eighteen Thousand One Hundred Forty Eight Dollars and Forty Four Cents and in addition thereto such proportion of said sum of Twenty Five Thousand Dollars (\$25,000) as may be legally due and owing under the terms hereof after any such cancellation or termination of this lease.

(c) Each and all of Lessee's agreements herein contained are conditions precedent, the performance of which shall be prerequisite within the option of the Lessor to the right of Lessee to remain in possession of the demised premises, or to have this lease continued in effect. Lessee covenants and agrees that upon the termination of this lease by the expiration of time or for any other reason, or in any other manner, it will surrender and deliver up the premises to Lessor in good order and condition excepting for such damage by fire, earth-

quake or other casualty, as Lessee is not required to repair under any of the provisions of this lease.

(d) It is covenanted and agreed that no waiver of a breach of any of the covenants of this lease shall be construed to be a waiver of any succeeding breach, or of any other breach of the same or any other covenant thereof. [420]

(e) As part of the consideration for the execution of this lease, Lessor agrees and covenants that it will procure Hamburger Realty Company, the owner of the fee of the herein demised premises, to ratify and approve and consent to the execution of this lease, and said ratification, approval and consent of said Hamburger Realty Company shall be evidenced by the execution of the consent herein-after attached and made a part hereof.

(f) It is further agreed by and between all of the parties hereto that this lease and all the terms and conditions thereof shall bind—and inure to the benefit of—as the case may require—the parties hereto and their respective successors and assigns and all parties claiming through or under them.

XVII.

And the said Lessee complying with all of the terms, conditions and covenants on its part to be kept and performed, shall have and enjoy the quiet and peaceful possession of the said demised premises according to the terms of this agreement.

In witness whereof, the said parties hereto have

duly caused these presents to be executed in their respective corporate names by their proper officers thereunto duly authorized, and have affixed their respective corporate seals thereto the day and year first above written—in duplicate.

A. HAMBURGER & SONS,
INCORPORATED,

By M. A. HAMBURGER,
Its President.

By OTTO SWEET,
Its Secretary.

THE MAY DEPARTMENT
STORES COMPANY,

By DAVID MAY,
Chairman of its Executive
Board.

By WILBUY D. MAY,
Its Secretary-Treasurer. [421]

State of California,
County of Los Angeles—ss.

On this 31st day of March in the year nineteen hundred and twenty three before me, Clara E. Olson, a Notary Public in and for the said County of Los Angeles, State of California, residing therein,

duly commissioned and sworn, personally appeared M. A. Hamburger, known to me to be the President, and Otto Sweet, known to me to be the Secretary of A. Hamburger & Sons, Incorporated, the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CLARA E. OLSON,
Notary Public in and for Los Angeles County, State
of California.

State of California,
County of Los Angeles—ss.

On this 31st day of March in the year nineteen hundred and twenty three before me, Clara E. Olson, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared David May, known to me to be the Chairman of its Executive Board, and Wilbur D. May, known to me to be the Treasurer of The May Department Stores Company the Corporation that executed the within instrument known to me to be the persons who executed the within instrument on behalf of

the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CLARA E. OLSON,
Notary Public in and for Los Angeles County, State
of California.

The undersigned, Hamburger Realty Company, the owner of the premises described in the foregoing Lease by and between A. Hamburger & Sons, Incorporated, as Lessor, [422] and the May Department Stores Company, as Lessee, hereby ratifies, approves and consents to the execution of said lease and agrees to protect the leasehold of said The May Department Stores Company against any failure of the title of said A. Hamburger & Sons, Incorporated, and in the event of any such failure of the title for any reason whatsoever, agrees to execute and deliver to said The May Department Stores Company, a new lease exactly identical to the foregoing lease and for the same term and on the identical conditions.

And further covenants and warrants that, the said Lessee in said aforesaid Lease, complying with all of the terms, conditions and covenants on its part to be kept and performed, shall have and enjoy the quiet and peaceful possession of the said demised premises according to the terms of said Lease.

In witness whereof the undersigned has caused these presents to be executed in its corporate name

by its proper officers thereunto duly authorized, and has affixed its corporate seal hereto the day and year first above written.

HAMBURGER REALTY
COMPANY,

By M. A. HAMBURGER,

By OTTO SWEET.

State of California,
County of Los Angeles—ss.

On this 31st day of March, in the year nineteen hundred and twenty three before me, Clara E. Olson, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared M. A. Hamburger, known to me to be the Vice-President, and Otto Sweet, known to me to be the Secretary of the Hamburger Realty Company the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same. [423]

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

CLARA E. OLSON,
Notary Public in and for Los Angeles County, State
of California. [424]

EXHIBIT 8

This Indenture of lease made and entered into at Los Angeles, California, this 30th day of March, 1923, by and between Hamburger Realty Company, a corporation organized and existing under the laws of the State of California, party of the first part, hereinafter designated as Lessor, and The May Department Stores Company, a corporation organized and existing under the laws of the State of New York, party of the second part, hereinafter designated as Lessee.

Witnesseth:

That said Lessor for and in consideration of the covenants and agreements hereinafter contained to be kept and performed by the Lessee, and in consideration of the rights herein reserved, does hereby lease and demise unto the said Lessee, and the said Lessee hereby takes and accepts from said Lessor all that certain real property with the building and appurtenances thereunto belonging, including the machinery, boilers and heating appliances therein contained, being situate in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:

Lot C of re-subdivision of the portion of Block 52 of the Huber Tract, as per map recorded in Book 12, page 1, of Maps in the office of the County Recorder of Los Angeles County.

Also Lot 20 in Block 52 of the Huber Tract in the City of Los Angeles, County of Los An-

geles, State of California, as per map recorded in Book 2, Page 280, Miscellaneous Records of said County.

This lease is made for the term and upon the conditions, covenants and agreements hereinafter expressed; and said Lessor for itself, its successors and assigns, and said Lessee for itself, its successors and assigns, do hereby respectively agree to keep, observe and perform each and all of the conditions, covenants, provisions and agreements hereinafter provided to be kept, observed and performed by said Lessor and said Lessee, respectively, to-wit:

I. Term

The term of this lease shall be thirty (30) years, commencing on the 1st day of January, 1943, and ending on the 31st day of December, 1972. [425]

II. Rent

(a) The Lessee does hereby covenant and agree to pay to Lessor as rental for the said premises for the term hereof the sum of Nine Million Dollars (\$9,000,000), in monthly installments, payable in advance on the first day of each and every calendar month during the term hereof, said monthly installments to be in the sum of Twenty-five Thousand Dollars (\$25,000) each, commencing on the first day of January, 1943, as aforesaid.

III. Taxes and Assessments

(a) As a further consideration for the leasing and demising, as aforesaid, of the said premises to the said Lessee, the said Lessee covenants and agrees to bear, pay and discharge in addition to the rents

heretofore reserved herein, all taxes, assessments, levies, rates, duties, tolls, imposts and charges of every kind, nature and description, whether general or special, ordinary or extraordinary, which may at any time, or from time to time, during the term hereof, by or according to any law or governmental, legal, political or military order or authority whatsoever, directly or indirectly, be taxed, charged, levied, assessed or imposed upon or against, or which shall be or may be or become a lien upon this lease, or upon all or any part of the land, building or premises hereby leased, or any building, improvement or structure now located, or that may be hereafter located or built thereon, or any estate, right, title or interest of the Lessor and of the Lessee, or either of them, or of their respective successors or assigns in or to said demised premises, or said building, improvements or structure; including also all water rates, gas, electric, fuel and power rates which may be charged against said premises during the term hereof; provided, however, that if any of the following obligations or liabilities shall be or become such lien, the Lessee shall not be required to pay or discharge the same under the terms of this lease, to-wit:

1. Any corporation franchise tax or corporation licensee fees which may be levied upon or against the Lessor.
2. Any tax which may be levied by the United States of America, or the State of California, upon or against the income, profits or capital stock of the Lessor, or any inheritance tax.

3. Any taxes which may be levied upon or against any real property of the Lessor other than the real property described in this lease.

The said Lessee further covenants and agrees to deliver to Lessor tax receipts of all taxes, assessments, and charges hereinbefore referred to, showing the payment of all taxes and assessments of every kind, nature and description whatsoever that shall have been levied or imposed upon said premises, or any part thereof, during the term hereof.

(b) The land, buildings and improvements covered and affected by this lease shall always be assessed for the purposes of taxation in the name of the Lessor, and Lessee agrees at all proper times to make and file the necessary statements with the proper taxation authorities so that hereafter the whole of the premises hereby demised will be assessed in the name of said Lessor during the entire period of the term hereof.

IV. Building

It is understood and agreed that said Lessee has examined and knows the contents and condition of the premises herein demised, and it is hereby acknowledged that no statements, warranties or representations of any kind whatsoever regarding the present or future condition of said premises have been made by Lessor to Lessee except as are herein specifically set forth, and it is agreed that said premises are now in good condition and repair, and said Lessee hereby accepts the same in their present condition, and hereby agrees to accept the same in their condition existing at the time of the commencement of the term hereof.

V. Upkeep and Repair

It is further understood and agreed that Lessor is not bound to keep said premises in repair, and that said Lessee shall make all repairs in and about said premises, and said Lessee agrees to keep the same in good condition and repair during the entire term hereof, and at the end of the term hereof, or at any sooner termination, to quit, surrender and deliver the possession of the herein demised premises to said Lessor in as good condition as exists at the date hereof, ordinary use and damages by the elements excepted. In case Lessee fails to keep said premises in repair, Lessor shall have the right to enter in or upon said demised premises, or to make any and all repairs necessary or proper to protect or preserve said premises, and all said repairs so made shall be at the expense of said Lessee, and said Lessee hereby agrees to repay to said Lessor any expense so incurred upon the first day of the calendar month succeeding the making of said repairs.

VI. Use of Premises and Indemnity

(a) Lessee is hereby given the right to assign or sublet the whole or any part of the herein demised premises for any lawful use so long as said use is of such a character as not to injure the reputation of the premises or the sale value or rental value thereof. Lessee covenants and agrees that it will not use, or permit any other person or persons to use said demised premises, or any part thereof, in any manner or for any purpose in violation of any of the laws of the United States or of the State of

California, or of any Ordinances of the City of Los Angeles, or of any rule [427] or regulation of any Board, Commission or other Municipal or Governmental agency affecting said premises or the use thereof; and not to use said premises, or any part thereof, so as to constitute a public nuisance, or a nuisance to the owners of adjoining or neighboring property, or to maintain any nuisance on said premises, or for any other use whatsoever that would tend to injure the reputation or rental or other value of said premises; that it will not use said premises, or any part thereof, for any purpose or in any manner, or do or permit to be done thereon, or suffer to be done, any set or thing whatsoever that will violate any policy of insurance, or suspend or render inoperative any policy of fire or rent insurance now or hereafter, during the term hereof, earned on the whole or any part of said demised premises, and particularly that it will not keep, or suffer or permit to be kept, on said demised premises any gasoline, distillate or other petroleum product for use for heating, lighting, or other purpose, or that may be extra hazardous, without first obtaining the written consent of all insurance companies carrying fire or rent insurance upon said premises, or any part thereof. It is further agreed that Lessee shall conform to all laws, ordinances, rules and regulations affecting said premises, and the sidewalks and streets and alleys in front of or around said premises; that it will keep and save harmless said Lessor from any damage or penalty or charges imposed for violation of any of said laws

occasioned by the use, misuse or neglect of said Lessee, or of any tenants or tenants holding under it, and of all other persons occupying said premises.

(b) It is further agreed that said Lessor shall not be liable for any damage of any kind occasioned by failure to keep said premises in repair during the term hereof, and shall not be liable to the said Lessee, or to anyone else, for or on account of any damage or injury done or occasioned by or from the use, misuse or neglect of the herein demised premises, or from the condition of said premises or the plumbing, gas, water, steam or other pipes or sewage, or in any other way or manner growing out of the present, past or future condition of said premises, nor on account of the elevators, escalators, engines or machinery of said building, or for accidents, injuries or damages in or about the portion thereof, or otherwise; and it is further agreed that said Lessee will indemnify and save and keep harmless the Lessor against and from any loss, cost, damage or expense arising out of any action or other occurrence causing injury to any person or property whatsoever due directly or indirectly to the use of said premises, or any part thereof, by said Lessee or any person or persons holding under it or in its employment, or otherwise using said premises, including damage or injury to any person or property occurring on said premises or in the streets, sidewalks or alleys surrounding said premises, due directly or indirectly to the use of said premises, and to carry adequate accident insurance covering the same. [428]

VII. Improvements or Additions to the Building

(a) Lessee is hereby given the right to erect additional stories on the building hereby demised so long as the erection of said additional stories is not in violation of any building ordinances or regulations of the City of Los Angeles, provided that before the erection of such additional stories Lessee shall first obtain the written approval of the Lessor, or of the architect of Lessor, of the plans and specifications for such additional stories, provided, however, that such approval shall not be unreasonably withheld. Such additional stories and any other alterations in, or additions to, the building now standing on said premises, shall be entirely at Lessee's own cost and expense, and any such additional stories, additions or alterations shall immediately be and become a part of the realty, and shall be and remain the property of the Lessor, but any trade fixtures placed by Lessee in or about said premises at any time during the term hereof may be removed therefrom by Lessee at or prior to the expiration of the term hereof, unless said Lessee be in default in any of the terms hereof, upon condition, however, that Lessee shall immediately repair any and all damage caused to said demised premises, or any part thereof, by the removal of any such trade fixtures.

(b) Any changes, repairs, alterations or improvements in the herein demised building other than the erection of additional stories thereon may be made by Lessee at its own cost without the approval of said Lessor, upon the express restriction

and condition, however, that such changes, repairs, alterations or improvements shall be of such a character as not to weaken or impair the structural strength of said building.

VIII. Mechanics' and Other Liens

(a) All of the provisions of this lease relating to mechanics' or other liens, and all of the obligations of Lessee with reference thereto, shall apply not only to the building now standing upon the demised premises, but to every substitute therefor and replacement thereon, and to any and all repairs, additions, restorations and work that may be done or caused to be done at any time by Lessee in or upon the demised premises, or any building or structure standing thereon.

Lessee covenants and agrees to keep the demised premises and all buildings thereon, and every part thereof and interest therein, free and clear of mechanics' liens and other liens for labor, services, supplies, equipment or materials, and agrees that at all times it will fully pay and discharge and wholly protect and save harmless Lessor, and the right, title, and interest of Lessor, and its successors and assigns in and to said premises, and the whole thereof, from any and all demands or claims which [429] may or could ripen into such liens, and from any such liens, and from any attorneys' fees and costs and expenses which may be incurred by Lessor or by Lessee by reason of or on account of any such lien or claims, or the assertion or filing thereof. Should Lessee fail to pay off and fully discharge any such liens or claims within thirty (30)

days after the same have attached to said property, or to any interest therein, Lessor at its option may pay, adjust or compromise the same, or any portion thereof, in any such manner as it may elect, and in so doing Lessor shall be and remain the sole judge of the legality of such lien or claim, and the validity thereof, to the full amount of such payment, adjustment or compromise provided, however, that if Lessee desires to do so, it may contest any such claim or lien upon giving written notice to Lessor within said period of thirty (30) days of its intention so to do. In the event that said contest be made and litigation should ensue, then within ten (10) days after the entry of any final judgment which may be recovered in any such action against said Lessor or against said Lessee, or either of them, or against said premises or against any part thereof, or any interest therein, Lessee shall pay and fully discharge said judgment; and in the event that Lessee fails or neglects so to do, Lessor may make such payment, or adjust or compromise such claim or judgment in such manner as it may elect. In the event of any such litigation at all times after entry of any judgment, and pending the final determination of such litigation, Lessee by proper orders of Court or by deposit of money, or by a good and sufficient undertaking, or otherwise, as may be required or permitted by law, shall wholly stay and keep wholly stayed any execution of any such judgment, and of every part thereof, that may be rendered or entered in said litigation against said Lessor or said Lessee, or against any estate or interest

or either of them in or to said leased premises or any buildings or improvements thereon; and if such stay of execution should not be accomplished, or if the same shall not be preserved at all times as aforesaid, Lessor at any time after the ten (10) days' written notice to the Lessee of its intention so to do, may compromise and cause any judgment to be satisfied and discharged upon such terms and conditions, as the Lessor may deem fit.

(b) In any event whatsoever Lessor shall have the right, at its option, to redeem the leased premises and the buildings and improvements thereon, or any part thereof, or any and every estate, right, title and interest therein, from any and all sale under any judgment or any foreclosure of any mechanics' lien or lien of like nature, without any notice whatsoever to said Lessee.

Lessee agrees to pay to Lessor and to reimburse it for all moneys which it may pay out in discharge of any such claims, liens or judgment, or for any redemption from any said sale, and for all reasonable attorneys' fees, costs and expenses which may be incurred by Lessor by reason or on account of the same; and all such sums of [430] money shall be repaid by Lessee to Lessor on or before the first day of the calendar month ensuing after the same shall have been expended by Lessor.

(c) The payment by Lessor of any such claim, lien or judgment in the manner above described, or the payment and making of any such redemption in the manner above described, shall, as between the parties hereto, be deemed to be conclusive evi-

dence of the validity of such claim, lien, judgment or sale, and of the regularity of all acts and proceedings relative thereto, to the extent of the full amount expended by the Lessor therein or therefor.

(d) Lessee shall give notice promptly and in writing to Lessor as soon as it receives any information of any claim, lien or suit affecting the premises hereby demised, or any part thereof, or any interest therein.

(e) It is agreed between the parties hereto, and notice to whom it may concern is hereby given by Lessor, that Lessor shall not, nor shall its successors or assigns, nor shall any part of the premises herein demised, or of any interest therein or thereto, be or become liable for or on account of any lien or liens, or claim or claims, that may be asserted or filed for or on account of the erection, construction, addition to or repair of any part of said premises, or for or on account of any services, work, supplies or materials that may at any time be done or furnished in and upon or about the demised premises, or any part thereof.

(f) Lessor or its agents shall have the right to go upon the demised premises at any and all times, and to inspect said premises, and each and every part thereof, being altered, repaired, erected, constructed or in course of construction, and to serve or post and keep posted thereon, or on any part thereof, any notices provided for by Section 1192 of the Code of Civil Procedure of the State of California, or any notice or notices that may at any time be proper, or that may be required or permitted by any other law.

(g) Lessee agrees that it will not permit any work of construction, addition, alteration or repair, or any other work that might cause any claim or lien to attach to said premises, or any part thereof, or any interest therein, to be commenced until and unless it has given written notice to Lessor of the contemplated commencement of such work, in order that Lessor may be afforded an opportunity to post the notices referred to in this Paragraph (f) hereof.

IX. Insurance

(a) Lessee agrees to, during the entire of the term hereof, maintain fire insurance upon the building now located on said demised premises, or which may hereafter be constructed upon or added to, or substituted for said building, and upon all appurtenances belonging thereto, in an amount of not less than seventy per cent (70%) of the actual value at the time such insurance is written on such building and all such additions thereto or substitutes therefor.

(b) Policies of insurance shall be so issued as to cover and insure all of the several interests of the Lessor, the Lessee, and the holder of any mortgage or deed of trust against said premises, and shall be so written that in case of loss or damage the proceeds of such insurance shall be and shall become payable to such parties as their interests may appear.

(c) Lessee agrees that it will at its own cost and expense at all times during the term hereof, provide, promptly and punctually pay all premiums

demande for all and any insurance policies whatsoever contemplated in this lease, and should Lessee fail to pay therefor, or fail to insure said premises, as herein provided, said Lessor shall have the right to insure the same in any company or companies that it may deem fit, and all said insurance shall be at the expense of said Lessee, and Lessee agrees to repay the cost thereof to Lessor all sums so expended on the first day of the calendar month ensuing after the date of such payment; and Lessee further agrees to maintain in full force and effect during the term hereof any and every form of insurance that may be required by any law, ordinance or governmental regulation to be carried or maintained by the owner of the demised premises, and also to require every contractual performance and any work thereon under or by agreement with or permission of Lessee, to provide and maintain all insurance of any kind that may be required of it to be carried by it against injury to its employees, or against injury to other persons, or otherwise, and Lessee agrees to indemnify Lessor against, and save harmless from any liability, claim or expense, including costs and reasonable attorneys' fees which might accrue by reason of the failure of Lessee or of any of the other persons hereinbefore designated to provide and maintain such insurance.

In particular Lessee agrees that at all times during the term hereof, it will maintain in full force and effect such policy or policies of insurance in such amounts and with such companies as may be approved by Lessor, insuring Lessor against claims

of any nature whatsoever to persons or property arising out of or resulting from any accident occurring in or about, or by reason of the [432] operation or construction of any elevator, escalator, boiler, or other machinery or equipment, now or hereafter in or about said premises. And Lessee agrees to hold Lessor harmless from any loss, claim or expense whatsoever arising out of, or resulting from, the construction, maintenance or operation of any such elevator, escalator, boiler or other machinery or equipment, including the expense of opposing or defending any claim that may be made, or any suit that may be instituted against Lessor by reason thereof.

(d) Lessee agrees that it will not enter into any contract for the reconstruction of the building now standing upon said premises, or for the addition to or alteration or repair of such building until and unless the contractor or contractors undertaking such work shall be fully insured in an insurance carrier satisfactory to Lessor against any claim under the employer's Liability and Workmen's Compensation Act of the State of California, or any other law or statute of any other jurisdiction which may then be in force arising out of or resulting from any injury to or death of any person employed in or about the work covered by said contract.

(e) Lessee agrees to carry and maintain adequate riot or civil commotion insurance, and public liability or accident insurance of all kinds insuring against loss, damage or injury to personal property occurring on the premises or any part thereof or

in the streets or on the sidewalks or alleys surrounding said premises due directly or indirectly in any manner whatsoever to the use of said premises.

(f) All policies of insurance affecting the Lessor herein or the Lessor's interest hereunder shall be delivered to the Lessor, it being understood that fire insurance policies covering Lessee's stock of merchandise, fixtures, furniture and the like and* compensation insurance and insurance similar in nature thereto need not be delivered to the Lessor but shall be retained by the Lessee. All such policies of insurance to be delivered to the Lessor hereunder shall be in companies acceptable to said Lessor.

*Accident and liability insurance and (M.A.H. & W.D.M.)

X. Fire and Earthquake

(a) It is understood and agreed that the department store building now in existence and erected upon the herein demised premises consists of six stories and a basement. If at any time during the first twenty-five (25) years of the term hereof said building—to-wit, said building so consisting of six stories and a basement, without the addition thereto of any additional stories thereon—now standing upon the premises or any part thereof or any substitute therefor or addition thereto, be wholly or partially destroyed by fire, Lessor agrees to immediately reconstruct [433] the same or make any necessary repairs thereon so as to place said building, or any part thereof so damaged or destroyed, as near as may be possible in the same condition as existed at the time of such destruction.* The pro-

*Damage or injury. (M.A.H. & W.D.M.)

ceeds of any and all fire insurance policies shall be turned over to and used by Lessor for such reconstruction or repairs.

And whereas, under the provisions of paragraph VII hereof, Lessee is given the privilege of erecting an additional story or stories on the building now standing on the herein demised premises, it is now therefore hereby agreed that in the event that at the time of such destruction or injury by fire there shall have been erected by Lessee an additional story or stories on the building hereby demised, and such additional story or stories shall be destroyed or injured by fire, Lessee is hereby given the privilege and option, either to reconstruct or repair such additional story or stories so injured or destroyed so as to place the same, as near as may be practicable in the same condition as existed at the time of such destruction or injury; and the proceeds of all fire insurance policies covering such additional story or stories shall be turned over to and used by Lessee for such reconstruction or repairs and any money that may be required to thus reconstruct or repair said additional story or stories in excess of the proceeds of said fire insurance policies covering the same, shall be expended for such purpose by Lessee out of its own funds, or Lessee if it so elects may not reconstruct or repair such additional story or stories, but may retain the proceeds of all fire insurance policies covering the same and such proceeds shall be and belong to said Lessee—it being understood, however, in such latter event that the said building shall be completely roofed at the sole cost and expense of said Lessee.

(b) Whereas, Lessee is not obligated, under the terms of this lease to carry earthquake insurance on the building herein demised or any part thereof; now therefore it is agreed that in the event of any destruction or injury during the first twenty-five (25) years of the term hereof, of the building now standing upon the herein demised premises or any part thereof or any substitute therefor, or addition thereto, by earthquake, Lessee shall, at its own cost and expense, immediately repair or reconstruct or make the necessary repairs thereon so as to place said building in the same condition as existed at the time of the execution of this lease.

(c) In no event shall such destruction or injury by such fire or earthquake, during the first twenty-five (25) years of the term hereof, as aforesaid, be deemed to be a termination of this lease, but said lease shall continue in full force and effect, subject to partial suspension or diminution for the rent of said premises as hereinafter more fully defined, based upon the amount of time consumed in making said repairs and based upon the amount of space of which Lessee is deprived during the time when said repairs are being made—and all based upon the monthly rental of Twenty-five Thousand Dollars (\$25,000) per month—provided, [434] however, that no suspension or diminution of rent shall be made on account of depriving Lessee of space in any additional stories that may be erected by Lessee upon the building now occupying the herein demised premises, it being understood that Lessee, in the

erection of said additional stories assumes the entire risk and responsibility therein and thereby.

(d) If at any time during the last five (5) years of the term hereof, the building then standing on the herein demised premises or any part thereof, be wholly or partially destroyed by fire or earthquake or other action of the elements and such damage, injury or destruction cannot be repaired within one hundred (100) working days, then and in that event Lessor is hereby given the right and option to either terminate this lease as of the date of such damage, destruction or injury, or to continue this lease in full force and effect. In the event that Lessor does not exercise its said option to terminate this lease, then said building shall be reconstructed or repaired in the same manner and to the same extent and at the cost or expense of the same parties as though said destruction or injury had occurred during the first twenty-five (25) years of the term hereof and subject to the same diminution or suspension of rent as though said damage, destruction or injury had occurred during said first twenty-five (25) year period. If said damage, injury or destruction can be repaired within one hundred (100) working days, then said building shall likewise be reconstructed or repaired in the same manner and to the same extent as though said destruction or injury had occurred during the first twenty-five (25) years of the term hereof and subject to the same diminution or suspension of rent as though said damage, destruction or injury had occurred during said first twenty-five (25) year period.

(e) No restoration, alteration or repair shall be required which, at the time, shall be contrary to any building ordinance or law of the City of Los Angeles, County of Los Angeles, or State of California.

(f) In no event shall lessee be entitled to compensation or damages for or on account of or from any matter or thing arising out of, or resulting from, such destruction or damage, or for any annoyance or confusion in reconstructing the same, or making any repairs thereto, or otherwise, except as expressly set forth in this Paragraph X.

(g) With reference to the maintenance of fire insurance by Lessee on the building herein demised, it is understood and agreed that if said Lessee should fail or neglect to maintain fire insurance on said building in the manner as hereinbefore provided for in Paragraph IX, and provided Lessor shall notify Lessee in writing to that effect, then and in that event Lessor shall not be obliged to make any repairs or improvements whatsoever, but the proceeds of any insurance policies shall be deposited for the use of Lessee, and Lessee shall then therewith reconstruct or repair said building in such a manner as to place the same in as good condition as it existed at the time of the execution of [435] this lease, paying and bearing whatever excess may be required to effect such reconstruction over and above the amount of the proceeds of such insurance policies.

(h) In determining such diminution of rent based on loss of space, due consideration shall be given to the beneficial use and value of the space of which Lessee shall be so deprived.

And it is agreed that if the said parties cannot agree upon the amount of such diminution, then each shall, within ten (10) days after the occurrence of said casualty, appoint an arbitrator and if such two arbitrators cannot agree, they shall, within ten days thereafter, appoint a third arbitrator, and the decision of any two of said arbitrators shall be final and fix the amount of diminution to be allowed from said rent for such loss of beneficial use. Said Lessee shall, however, during said period pay the full rent called for by said lease and shall receive credit for the amount that shall be so awarded, upon the next rental payment or payments that may become due after such award.

XI. Notices and Demands

It is further agreed that whenever any notice or demand is required to be, or may be given, by either of the parties hereto to the other or to their respective successors or assigns, service of such notices or demands shall in each and every instance be complete as to and upon said Lessor, its successors or assigns, by personally serving such notice or demand upon any officer of said Lessor, or by posting the same in the United States mails, postage prepaid thereon, addressed to said Lessor at such address as may from time to time be designated by Lessor; and as to and upon said Lessee, its successors or assigns then holding under and by valid assignment, by personally serving such notice or demand upon any officer of said Lessee, or by posting the same in the United States mail, postage prepaid thereon, addressed to said Lessee at No. 801 South

Broadway, Los Angeles, California, or such other address in the City of Los Angeles, as may be designated by Lessee.

XII. Assignments and Subleases

(a) Said Lessee is hereby given the right to sublet or assign the whole or any part of this lease to any corporation or to any person of the Caucasian race of good moral character and good financial responsibility, so long as such subletting or assigning shall be for any first class lawful use which will not injure the reputation of the premises or injure the sale value or rental value thereof; and said assignment shall not be valid until and unless said assignee shall assume and agree in writing for the use and benefit of the Lessor, to carry out, perform and be bound by each and all of the Lessee's agreements herein contained. [436]

No interest of Lessee or of its successors or assigns, or of any of them, in this lease, or any interest therein, or in the demised premises, or any part thereof, shall be assignable or transferable, or assigned or transferred, by bankruptcy or insolvency or other similar operation of law. In no event shall this lease, or any interest therein, be or be deemed to be an asset of the estate of said Lessee, or its successors or assigns, or any of them, should they or any of them be adjudicated bankrupt or insolvent.

(b) Lessee agrees that it will not suffer or permit this lease, or any interest therein, or the demised premises or any part thereof, or any of the

property of it, kept or allowed to be kept, or located in or about the demised premises, to be held, kept, possessed, attached, levied or liened upon for a longer period than ten (10) days under any writ of attachment, writ of execution, or any other process or any other matter growing out of a suit or proceeding in law or equity. Nor will they, or any of them, commit any act of bankruptcy, or permit any adjudication of bankruptcy.

(c) No assignment whatever shall be made or attempted or suffered to be made by Lessee, its successors or assigns, if at the time of such attempted assignment said Lessee, or its successors or assigns, attempting to make such assignment be in default in the performance of any of its agreements herein contained.

(d) No assignment shall be made or effected except by an instrument in writing by the assignor and assignee, and an original duplicate of such assignment by the Lessee and the acceptance thereof by the assignee shall be furnished to Lessor before such assignment shall become valid.

(e) Any assignment purported or attempted to be made otherwise than in accordance with the provisions of this lease shall be voidable at the option of the Lessor, and any attempt to make or suffer or permit such assignment by Lessee, its successors or assigns, or to fail to keep all of the terms and agreements of this Paragraph XII shall be and be deemed to be at the option of Lessor a breach of the condition of this lease, and subject to all of the rights of Lessor to terminate the same as herein provided.

(f) No subletting or assignment shall in any manner whatsoever release the Lessee hereunder from any or all of the obligations by it to be performed under this lease, including the payment of the rentals provided to be paid hereunder and the faithful performance of all of the other terms and conditions hereof.

XIII. Forfeiture for Default

(a) Lessor shall not be required to give any notice of default or demand for possession, or any other demand [437] or notice other than as herein provided. All subtenants or other persons claiming, or in possession of all or any part of the demised premises, under or through Lessee, shall be deemed to have waived any notice of default or demand of any kind whatsoever.

(b) In the event of any action in law or in equity to collect any rent which may become due hereunder, or to enforce any of the terms or conditions of this lease, or to recover damages for any breach thereof, or to terminate this lease by reason of any default on the part of Lessee, or to recover possession of the demised premises—Lessee will pay to Lessor if Lessor recover judgment against Lessee, such sum as may be judged reasonable as Lessor's attorneys' fees therein, and such additional fee may be included in and be a part of any judgment which may be so rendered.

(c) No waiver of any breach or any term or condition of this lease shall be construed as a waiver by Lessor of any subsequent breach of the same or of any other term or condition.

(d) The several rights, remedies, elections, pow-

ers and options of Lessor contained in this lease shall be construed as cumulative and no one of them is exclusive of the others, nor of any other right or priority now or hereafter allowed by law.

(e) It is further understood and agreed by and between the parties hereto that the right given in this lease to the said Lessor to collect the rent that may be due under the terms of this lease by any proceedings under the same, or the right to collect any additional rent, monies or payments due under the terms of this lease by any proceedings under the same, or the right herein given to the Lessor to enforce any of the terms and provisions of this lease shall not in any way affect the right of the Lessor to declare at its option this lease, or any sublease thereunder, or assignment or other transfer thereof void and terminated—and the term hereby created or any assignment or sublease thereunder or other transfer thereunder ended.

(f) All sums of money which are to be paid or repaid by Lessee to Lessor under any of the provisions of this lease shall be paid in gold coin of the United States of America of the present standard weight and fineness, and shall become due and payable unless otherwise specified herein with specific reference to a particular payment or class of payments immediately when any advance is made, of expense, incurred by Lessor for any of the matters or things or under any of the foregoing provisions of this lease.

XIV. Ownership of Building

Lessor represents that the premises and the building located thereon are owned in fee simple by the

Lessor, and that said premises are free and clear of all incumbrances excepting only that at the date hereof there exists against the same a Deed of Trust in the sum of approximately One [438] Million Six Hundred Sixty-six Thousand Dollars (\$1,666,000), and a lease to the United States of America recorded in Book 109, Page 117, of Leases, records of Los Angeles County, and reference thereto is hereby made.

XV. Time Is Essence of This Lease

Time is expressly made the essence of this agreement, including particularly with reference to the prompt payment and discharge of all rents, claims, liens, taxes, assessments and like obligations.

In the event of a default by Lessee in any of the terms, covenants and conditions in this lease provided by it to be performed, Lessor shall serve written notice upon Lessee of such default, and Lessee shall have sixty (60) days thereafter within which to cure or correct such default. It is understood and agreed, however, that Lessee shall not be given said period of sixty (60) days within which to cure any default, which default is not subject to being cured or corrected. Interest on delayed rentals shall be paid at the rate of seven per cent (7%) per annum and shall be paid on the next rent day succeeding such default.

XVI. Miscellaneous Covenants

(a) Should the Lessor elect to re-enter and take possession of said premises under any one or more of the conditions described in this lease, said Lessor may, at its option, either terminate this lease

and recover from the Lessee all damages caused by breach thereof by said Lessee, including all reasonable attorney's fees which Lessor may be required to incur in recovering possession of said premises and in collecting said damages, or Lessor may, without terminating this lease, relet said premises or any part thereof for all or any part of the remainder of said term to a tenant or tenants satisfactory to it and at such rental as it may with reasonable diligence be able to secure, and should such rental be less than that hereinbefore agreed to be paid by Lessee, Lessee agrees to reimburse Lessor for all reasonable expenses which may be incurred by Lessor in reletting said premises and pay said Lessor monthly in advance upon the day of each calendar month when the rental herein provided to be paid becomes due and payable, the amount of any such deficiency in said rent. No re-entry of said premises by Lessor as herein provided shall be considered as an election on its part to terminate this lease unless written notice to that effect is delivered to Lessee.

(b) Each and all of Lessee's agreements herein contained are conditions precedent, the performance of which shall be prerequisite within the option of the Lessor to the right of Lessee to remain in possession of the demised premises, or to have this lease continued in effect. Lessee covenants and agrees that upon the termination of this lease by the expiration of time or for any other reason, or in any other manner, it will surrender and deliver up the [439] premises to Lesser in good order and condition ex-

cepting for such damage by fire, earthquake or other casualty, as Lessee is not required to repair under any of the provisions of this lease.

(c) It is recovenanted and agreed that no waiver of a breach of any of the covenants of this lease shall be construed to be a waiver of any succeeding breach, or of any other breach of the same or any other covenant thereof.

XVII.

And the said Lessee complying with all of the terms, conditions and covenants on its part to be kept and performed, shall have and enjoy the quiet and peaceful possession of the said demised premises according to the terms of this agreement.

XVIII.

It is understood and agreed that this lease and the rights given to Lessee hereunder are to take effect on the 1st day of January, 1943, upon the express condition that the Lessee hereunder, or its successors or assigns holding under valid assignment are in the lawful possession and occupancy of the herein demised premises on December 31, 1942, under that certain lease dated contemporaneously herewith by and between A. Hamburger & Sons, Incorporated, as Lessor therein and The May Department Stores Company as Lessee therein, the term whereof commences on January 1, 1923, and ends on December 31, 1942. In the event that Lessee is not in the lawful possession and occupancy of said premises on said 31st day of December, 1942, then and in that event no rights shall pass hereunder and

this lease shall, at the option of Lessor, be and become null and void for any and all purposes whatsoever.

XIX.

It is further agreed by and between all of the parties hereto that this lease and all the terms and conditions thereof shall bind—and inure to the benefit of—as the case may require—the parties hereto and their respective successors and assigns, and all parties claiming through or under them.

In Witness Whereof, the said parties hereto have duly caused these presents to be executed in their respective corporate names by their respective* thereunto duly authorized, and have affixed their respective corporate seals thereto the day and year first above written—in duplicate.

*Proper officers.

HAMBURGER REALTY
COMPANY.

By M. A. HAMBURGER, ESQ.,
Its Vice President.

By OTTO SWEET,
Its Secretary.

THE MAY DEPARTMENT
STORES COMPANY.

By DAVID MAY,
Chairman of Its Executive
Board.

By WILBUR D. MAY,
Its Treasurer. [440]

State of California,
County of Los Angeles—ss.

On this 31st day of March, in the year nineteen hundred and twenty three before me, Clara E. Olson, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared M. A. Hamburger, known to me to be the Vice-President, and Otto Sweet, known to me to be the Secretary of Hamburger Realty Company, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CLARA E. OLSON,
Notary Public in and for Los Angeles County, State
of California.

State of California,
County of Los Angeles—ss.

On this 31st day of March, in the year nineteen hundred and twenty-three before me, Clara E. Olson, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared David May, known to me to be the Chairman of its Executive Board, and Wilbur D. May, known to me

to be the Treasurer of The May Department Stores Company, the Corporation that executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CLARA E. OLSON,
Notary Public in and for Los Angeles County, State
of California.

EXHIBIT 9

Moody's Manual of Investments

3. F. & R. Lazarus & Co. 4%-4 $\frac{1}{4}$ % notes:

Authorized—\$3,250,000; outstanding, Sept. 30, 1940, \$2,930,256. All held by Equitable Life Assurance Society of the U. S.

Dated—Jan. 31, 1939.

Maturity—Jan. 31, 1964.

Interest Payable—At rate of 4% per annum for first 10 years and at rate of 4 $\frac{1}{4}$ % per annum for next 15 years.

Repayments—The loan is to be paid in monthly installments as follows: First 23 months, interest only; 24th month, \$14,610 to include interest and a payment of principal; 25th month and each month thereafter, \$17,500 to include interest and principal. At end of 25th year, the entire unpaid balance of principal and interest, if any, shall be due and payable. Each installment includes interest on un-

paid balance of principal for preceding month. The balance is to be applied on account of principal of loan and with privilege of company to prepay additional amounts on account of principal on any interest date, not to exceed 5% of original principal amount of loan in any one year, without charge and additional amounts in excess of 5% if paid during first 5 years, 2½% during second 5 years and decreasing ½% per annum each year thereafter to and at par in 15th year and thereafter.

Secured—By a mortgage on real estate located on High, Town, Front and Chapel Streets, Columbus, O., formerly held by company under lease from Huntington National Bank, Columbus, O.

Purpose—Issued to acquire fee simple and leasehold estates in Columbus, O., and to retire land trust certificates formerly outstanding.

Capital Stock: 1. F. & R. Lazarus & Co. 4¾% cumulative preferred; par \$100:

Authorized—And outstanding, Dec. 31, 1940, 28,365 shares; par \$100. All owned by Federated Department Stores.

Preferences—Has preference as to assets and dividends.

Callable—On or before Oct. 1, 1942 at 105, thereafter and on or before Oct. 1, 1944 at 105 less ½ for each full year elapsed after Oct. 1, 1942, and thereafter at 104.

Other Provisions—The company shall acquire on or before June 1 of each year beginning 1938 the greater of (a) a number of shares of such stock the cost of which to the company, exclusive of accrued

dividends, is \$30,000, or (b) a number of shares of such stock the cost of which to the company, exclusive of accrued dividends, is an amount equal to 4% of the consolidated net earnings after taxes of the company and its subsidiaries in the preceding fiscal year after deducting dividends on such stock during such year whether or not paid.

Dividends Paid—Regular dividends paid.

2. F. & R. Lazarus & Co. common; no par:

Authorized—500,000 shares; outstanding 370,000 shares; no par. Federated Dept. Stores, Inc. owns 98.77%.

Voting Rights—Has sole voting power except as provided in preferred.

Preemptive Rights—None provided.

Dividends Paid—

1931	\$0.25	1932.....	\$0.52½	1933.....	\$0.45
1934-35	0.60	1936.....	0.90	1937.....	1.80
1938	0.87½	1939.....	0.57½	1940.....	1.65
1941	0.85				

¹Jan. 25, 50 cents; Apr. 25, 35 cents.

Offered—(80,000 shares) at \$29 per share in Feb., 1929, by Lehman Brothers and A. G. Becker & Co., New York.

Price Range

	1940	1939	1938	1937	1936
High	21	17	18	17	17
Low	15	12	7½	bid	bid

Transfer Agent and Registrar:

Huntington National Bank, Columbus, Ohio.

Common Exchange Offer:

See “Common Exchange Offer Authorized” under Federated Department Stores, Inc., a preceding statement.

The May Department Stores Company
Capital Structure
Capital Stock

Issue—1. Common, Par Value \$10.

Amount Outstanding, 1,230,396 shs.

¹Earned per Sh.—1941, \$4.10; 1940, \$3.58.

¹Divs. per sh. 1941, \$2.25; 1940, \$3.75.

Call Price,

Price Range—1940, 53½-36¾; 1932-40, 70-91½.

¹Fiscal years ended Jan. 31.

History

Incorporated under New York laws, June 4, 1910, with perpetual charter, to take over and operate under the same management as theretofore, Shoenberg Mercantile Co. of St. Louis, Mo., operating The Famous department store, founded in 1869, the May Shoe & Clothing Co. of Denver, Colo, founded in 1889, the May Co. of Cleveland, O., founded in 1899, and the May Real Estate & Investment Co. of St. Louis, Mo. which held title to real estate occupied by the St. Louis and Denver stores.

Early in 1911 acquired business of Wm. Barr Dry Goods Co. of St. Louis, subsequently consolidated with the business of the St. Louis store as Famous-Barr Co. in June, 1912, purchased entire stock of Boggs & Buhl, operating a department store in Pittsburgh, subsequently sold. In 1912 acquired entire capital stock of the M. O'Neil Co., operating a department store in Akron, O.; its assets were transferred to the parent in 1917.

In Mar., 1923 acquired, for cash, Hamburger & Sons department store in Los Angeles, now oper-

ated as May Co. of Los Angeles. In Sept., 1927, purchased assets of Bernheimer-Leader Stores, Inc. of Baltimore, now operated as May Co. of Baltimore. In Sept., 1939 opened new \$2,000,000 store in West Los Angeles shopping district.

Subsidiaries

In Jan. 31, 1941, held 100% voting power in the following subsidiaries:

Name, place and date of incorporation and business:

Kingston Investment Co. (Mo. 1911)—Real estate

May Building Co. (Mo. 1924)—Real estate

May Building Co. (Cal. 1923)—Real estate

May Building Co. (O. 1913)—Real estate

May-O'Neil Building Co. (O. 1926)—Real estate

May Realty Co. (Md. 1923)—Real estate

Sostman Mercantile Co. (N. Y. 1911)—Buying agent

Van Catering Co. (Cal. 1935)

Inactive Companies:

Wm. Barr Dry Goods Co. (Mo. 1879)

Famous Shoe & Clothing Co. (Mo. 1879)

The May Co. (O. 1898)

May Department Stores Corp. (Del. 1920)

M. O'Neil Co. (O. 1892)

Business

Operates large department stores, as follows:

The May Co., Los Angeles, Cal. (2)

The May Co., Denver, Colo.

The May Co., Cleveland, O.

The May Co., Baltimore, Md.

The M. O'Neil Co., Akron, O.

Famous-Barr Co., St. Louis, Mo.

Company has offices in New York.

Principal Properties

St. Louis, Mo.: St. Louis store, located in the Railway Exchange Building, is on leased premises. Company owns certain fee properties, mainly garage and warehouse facilities, directly or through May Building Co. of Missouri, and leases certain property through Kingston Investment Co., a subsidiary.

Cleveland, O.: The Cleveland store, on the public square, is on property leased directly or through May Building Co. of Ohio. The latter owns in fee the Cleveland garage and warehouse properties.

Los Angeles, Cal.: Older unit, at 8th & Broadway, is held under long term lease, but store has been enlarged since acquisition by both fee and leasehold properties held by May Building Co. of California, which owns in fee the patrons' garage and warehouse. Delivery garage is held under long term lease. The new store, on the block bounded by Wilshire Blvd., Fairfax Ave., 6th St. and Orange Grove Ave., comprises 5 floors and a basement with 200,000 sq. ft. of floor space.

Akron, O.: Store, warehouse and garage property located in Main and State Streets is owned in fee by the May-O'Neil Building Co. Company owns directly warehouse property not now used by the store.

Denver, Colo.: The larger portion of the Denver store at 16th & Champa Sts. is erected on land owned in fee, balance being on property leasehold in which is vested in May Building Co. of Missouri.

Baltimore, Md.: Store property at Howard & Lexington Sts. is owned in fee by May Realty Co. of Maryland, which also owns in fee property at 311 W. Lexington St., lease to outside interests. Warehouse and garage properties are directly owned in fee.

Management

Officers:

M. J. May, President

L. D. Beaumont, Vice-President

S. B. Butler, Vice-President & Secretary

Jerome Dauby, Vice-President

N. L. Dauby, Vice-President

Tom May, Vice-President

W. D. May, Vice-President

F. Z. Salomon, Vice-President & Treasurer

S. M. Shoenberg, Vice-President

¹Harmon S. Auguste, Vice-President

¹L. M. Bodenheimer, Vice-President

¹H. L. Katz, Vice-President

¹Samuel Leask, Jr., Vice-President

¹W. J. Brunmark, Vice-President

¹Alfred Triefus, Vice-President

Leonard Strauss, Asst. Sec. & Asst. Trea.

Leo J. Wieck, Asst. Sec. & Asst. Trea.

¹Limited powers.

Directors:

L. D. Beaumont, Cap d'Antibes, France
S. B. Butler, St. Louis
Jerome Dauby, Akron
N. L. Dauby, Cleveland
A. D. Goldman, St. Louis
Lincoln Gries, Akron
R. H. Gries, Cleveland
Robert Lehman, New York
M. J. May, St. Louis
Tom May, Los Angeles
W. D. May, Los Angeles
M. D. May, St. Louis
C. M. Rice, St. Louis
Alfred Rose, New York
W. E. Sachs, New York
F. Z. Salomon, St. Louis
S. M. Shoenberg, St. Louis
Leonard Strauss, St. Louis

Annual Meeting: Fourth Tuesday in April at 11 Broadway, New York.

Number of Stockholders: May 1, 1938: About 8,000.

Number of Employees, May 1, 1938: About 20,000.

General Office: 6th & Olive Streets, St. Louis, Mo.

Management Profit-Sharing—Mr. N. L. Dauby receives no salary, his compensation being based upon a percentage of profits of Cleveland store. Aggregate remuneration received for fiscal year ended Jan. 31, 1940, \$146,748.

Mr. M. J. May received aggregate remuneration of \$100,125 for fiscal year ended Jan. 31, 1940.

Certain other officers receive fixed salaries and bonuses based upon a percentage of profits of various stores. Aggregate remuneration for such officers receiving bonuses of more than \$30,000 for fiscal year ended Jan. 31, 1940 was as follows: F. Z. Salomon, \$70,221; Tom May, \$62,988; R. H. Gries, \$57,018.

Income Accounts

Taken from company's annual reports: for prior years (as reported to SEC), see below.

Consolidated Income Account, years ended Jan. 31:

	1941	1940
1Net sales	\$112,954,904	\$103,905,198
Costs & expense.....	101,725,208	94,247,724
Maint. & repairs.....	707,157	462,053
Deprec. & amor.....	817,245	774,805
Ordinary taxes	1,889,761	1,842,468
Operating profit	7,815,533	6,578,148
Margin of profit.....	6.92%	6.33%
Other income	83,733	96,901
Total income	7,899,266	6,675,049
Int. & amortiz.....	291,258	272,668
Equip. addit., etc.....	537,209	1,007,987
Fed. income tax.....	1,674,000	991,500
Excess prof. tax.....	350,000	.....
Net profit	5,046,799	4,402,894
Dividends	2,768,346	24,613,910
Surplus for year	2,278,453	211,016
Prev. earn. surp.....	26,202,173	26,413,188
Earn. surp. 1-31.....	28,480,625	26,202,173
Earned per share.....	\$4.10	\$3.58
No. of shares	1,230,396	1,230,396

¹Including leased departments.

²Includes dividend of 75 cents per share paid January 22, 1940, which was in lieu of dividend that would have been paid on March 1, 1940.

Balance Sheets

Taken from company's annual reports; for prior years (as reported to SEC), see below.

Consolidated Balance Sheet, as of Jan. 31:

Assets:	1941	1940
Cash.....	\$ 9,870,090	\$ 5,653,685
1U. S. securities.....	352,992	359,042
Receivables, net.....	12,955,105	11,758,158
6Mdse. on hand.....	13,637,396	13,390,787
7Mdse. in transit.....	1,048,547	954,925
Oth. curr. assets.....	602,549	448,160
Total current	\$38,466,678	\$32,564,757
Land, bldgs., etc.....	36,525,879	34,914,460
Deprec., amort.	10,124,956	9,345,828
Net ld., bldgs.....	26,400,923	25,568,632
2Leases.....	1	1
4Furn. & fixt., etc.....	1	1
3Deliv. equip.	1	1
Goodwill, etc.	1	1
Idle prop., net.....	784,264	758,365
Invest. net.....	1,361,171	1,367,562
Deferred charges.....	763,327	642,449
Other assets.....	119,867	137,926
Total	\$67,896,233	\$61,039,695
Liabilities:		
Accounts payable.....	\$ 2,151,049	\$ 1,770,790
Accr. payroll.....	1,306,515	953,643
Accr. gen. tax.....	784,289	753,920
Fed. inc. tax.....	1,905,000	942,000
Accr. interest.....	55,525	71,540
Other accruals.....	47,215	43,735
Stamps, etc. res.....	338,589	300,140
Bank loan.....	600,000	.....
Mtge. due.....	131,250	336,250
Oth. curr. liab.....	352,846	244,616
Total current	\$ 7,672,279	\$ 5,416,635

	1941	1940
Mtges. payable	\$ 4,545,600	\$ 4,749,350
Bank loans	4,400,000	2,000,000
⁵ Defd. tax res.....	391,342	264,573
Insur., etc., res.....	64,573	65,150
Capital stock (\$10).....	12,303,960	12,303,960
Capital surplus	10,037,854	10,037,854
Earned surplus	28,480,625	26,202,173
	<hr/>	<hr/>
Total	\$67,896,233	\$61,039,695
Net curr. assets	\$30,794,399	\$27,148,122

¹At cost, less amortization of premium: Market value, Jan. 31, 1941, \$358,804; 1940, \$371,011.

²Acquired subsequent to organization of company—at nominal amount; 1941, \$871,411 (1940, \$948,724) on basis of original amount of \$3,017,700 less amortization of \$2,146,289 (1940, \$2,068,976).

³At nominal amount: \$181,248 (1940, \$171,552) on basis of cost—less depreciation.

⁴At nominal amount (1941, \$4,502,483; 1940, \$4,769,630) on basis of cost—less depreciation.

⁵On deferred profit from installment sales.

⁶At lower of cost or market.

⁷At cost.

Accounts certified by Touche, Niven & Co.

FINANCIAL & OPERATING DATA

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Statistical Record—Years to Jan. 31

	1941	1940	1939	1938	1937	1936	1935
Earned per share	\$4.10	\$3.58	\$3.10	\$4.00	\$4.12	\$2.81	\$2.68
2Dividends per share	\$2.25	\$3.75	\$2.25	\$3.75	\$3.50	\$1.85	\$1.60
3Price range		53½—36¾	53¾—40¾	53—28½	66½—33¼	70—43¾	57¾—35¾
Net assets per share.....	\$41.31	39.45	\$39.63	\$38.78	\$38.53	\$37.91	\$36.95
Fixed charges earned:							
Before Fed. taxes & deprec.	28.09	23.62	120.11	19.28	19.02	10.86	8.65
Before Fed. taxes & after deprec.	25.28	20.78	117.41	17.28	17.09	9.39	7.49
After Fed. taxes & deprec.	18.33	17.15	114.53	14.79	14.50	8.10	6.61
Net assets per \$1,000 funded debt.....	6.681	\$8.192	\$10.494	\$9.736	\$9.205	\$7.719	\$5.821
Net cur. assets per \$1,000 fund. debt.....	\$3,442	\$4,022	\$5,383	\$4,816	\$4,586	\$3,837	\$2,923
Number of shares	1,230,396	1,230,396	1,230,396	1,230,396	1,230,396	1,230,414	1,230,414

1After non-recurring income.

2Dividends disbursed within fiscal year.

3Price range for calendar years ended eleven months after fiscal years.

4Based on company's annual report.

Financial & Operating Ratios

	1940	1939	1938	1937	1936	1935	1934
Current assets ÷ current liabilities.....	6.01	6.52	5.25	4.55	5.60	6.51	7.88
% cash & securities to curr. assets.....	18.41	25.83	18.96	19.63	26.79	31.80	27.58
% inventory to current assets.....	44.05	39.94	44.08	47.18	42.87	40.19	43.96
% net cur. assets to net worth.....	55.92	56.70	53.13	55.91	57.11	60.63	61.45
% property depreciated	28.18	25.87	25.32	23.94	22.37	20.67	16.29
% ann. depr. to gross prop.....	2.18	2.19	2.04	2.14	2.18	2.09	1.52
Capitalization:							
% long term debt	12.21	9.53	10.27	10.86	12.95	17.18	.....
% common stock & surplus.....	87.79	90.47	89.73	89.14	87.05	82.82	100.00
Sales ÷ inventory	7.24	7.55	7.47	6.35	6.42	6.63	5.61
Sales ÷ receivables	8.84	9.13	9.26	9.33	9.40	9.74	9.41
% sales to net property.....	406.38	395.38	411.37	395.33	347.48	336.98	481.60
% sales to total assets.....	170.23	166.16	179.32	166.98	149.80	144.33	158.59
% net income to total assets.....	7.21	6.43	8.24	8.32	5.81	5.49	6.03
% net income to net worth.....	9.07	7.82	10.31	10.70	7.12	7.26	6.58

Analysis of Operations

	1940	*1939	1938	1937	1936	1935	1934
	%	%	%	%	%	%	%
Net sales	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Cost of goods sold	69.91	64.60	{64.59	78.89	79.89	80.34	95.66
Sell., gen. & adm. exp.	24.73	30.57	{29.17	14.78	15.09	14.89	
Operating profit	5.36	4.94	6.24	6.33	5.02	4.77	4.33
Other income .....	.10	.39	.09	.69	.69	.78	.72
Total income	5.46	5.35	6.33	7.03	5.71	5.55	5.05
Income deductions .....	.03	.35	.61	.74	.59	.48	.60
Int. & debt. disc. & exp.....	.24	.29	.30	.35	.54	.67	.....
Balance	5.19	4.69	5.43	5.94	4.58	4.39	4.45
Income taxes & surtax95	.82	.83	.95	.70	.59	.65
Net income	4.24	3.87	4.59	4.98	3.88	3.80	3.80

INCOME ACCOUNTS

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Comparative Consolidated Income Account, Years Ended Jan. 31

	21940	21939	21938	21937	21936	21935	1934
Net sales	\$103,905,199	\$98,411,263	\$107,030,180	\$101,754,866	\$89,277,765	\$86,795,995	\$76,469,968
Cost of goods sold.....	72,636,401	63,571,236	69,132,081	80,271,108	71,320,716	69,732,653	
Selling, general & adm. expenses.....	25,658,909	29,829,159	31,055,159	14,957,993	13,360,371	12,773,036	73,154,997
Provision for doubtful receivables.....	39,728	151,337	161,186	80,366	114,388	132,824	
Balance	5,570,161	4,859,531	6,681,755	6,445,398	4,482,291	4,137,482	3,314,971
Dividends & interest on securities.....	32,920	31,770	82,316	86,709	67,168	102,939	402,574
Interest on notes & accts. rec., etc.....			Not stated	359,020	303,702	313,448	
Rental income.....	65,856	59,410		81,323	79,239	70,890	
Disc. on purch. & sales tax coup.....				63,712	52,747	23,192	145,876
Miscellaneous other income.....	1,732	294,175	16,216	112,881	111,697	165,551	
Total income	5,670,668	5,244,885	6,780,286	7,149,043	5,096,843	4,813,501	3,863,421
Net cost of minor additions.....		320,595	525,408	615,130	443,171	316,678	144,375
Provision for decline in investments.....			60,612	74,350	53,222	50,075	243,009
Miscellaneous other deductions.....	3,606	22,958		43,601	24,776	47,686	70,672
Interest on funded debt.....	242,836	268,899	295,438	334,240	419,374	568,487	
Amort. of debt discount & expense.....	5,249	10,488	21,795	21,110	62,308	16,265	
Other interest	24,583	2,068	39,357	20,155	5,839	2,696	Not stated
Balance	5,394,395	4,619,877	5,807,771	6,040,458	4,088,154	3,811,614	3,405,365
Provision for Federal income taxes.....	991,500	810,000	871,000	914,500	625,000	510,000	500,000
Surplus on undistributed profits.....			19,600	55,500			
Net income to surplus.....	4,402,895	3,809,877	4,917,771	5,070,458	3,463,154	3,301,614	2,905,365
Earned surplus beginning of year.....	26,413,188	25,371,656	25,067,788	24,303,648	23,116,719	21,783,735	19,683,975
Other surplus credits.....							425,000
Capital dividends.....	4,613,910	2,765,345	4,613,903	4,306,318	2,276,225	1,968,630	1,230,606
Earned surplus end of year.....	\$ 26,202,173	\$ 26,413,188	\$ 25,371,656	\$ 25,067,788	\$ 24,303,648	\$ 23,116,719	\$ 21,783,735
Supplementary P. & L. Data							
Depreciation & amortization.....	\$ 774,806	\$ 759,182	\$ 710,975	\$ 724,425	\$ 720,250	\$ 678,576	\$ 287,754
Maintenance & repairs.....	462,053	464,110	545,783	285,345	275,318	283,274	Not stated
Taxes (other than Federal income).....	1,842,468	1,841,647	1,612,606	919,867	773,950	727,484	
Rents and royalties.....	1,384,042	1,498,592	1,553,207	2,690,481	2,838,518	2,857,898	
Parent company's net sales.....	\$103,839,075	\$98,318,077	\$106,913,965	\$101,754,866	\$89,277,765	\$86,795,995	Not stated
Net income of parent company.....	4,405,323	3,815,117	4,929,801	5,070,458	3,463,154	3,301,614	2,905,365

¹Taken from company's reports to stockholder and includes only company's accounts in 1934.

²Taken from reports to Securities and Exchange Commission and includes accounts of company, its real estate holding companies and other subsidiaries.

Accounts for years 1937-38 and subsequent are not strictly comparable with those of 1936-37, 1935-36 and 1934-35 item for item. Prior to 1937-38 greater portion of items shown under "Supplementary p. & l. data" below statement is included in "Cost of goods sold" and remaining portion included in "Selling, general & administration expenses." For the year 1937-38 and subsequent years SEC reports do not include any part of such items in "Cost of goods sold"; such items are shown separately in report, but in above statement are included in item "Selling, general & administration expenses." Comparability is also affected by change in stating "Cost of goods sold"—in year 1937-38 purchase costs are stated net of discounts and miscellaneous other store income, such as "Interest on notes & accounts receivable, etc." and "Rental income" (shown separately in prior years), has been applied as a reduction of purchase costs.

³Gross sales less discounts, returns and allowances (including leased department sales).

⁴Includes related portions of items under "Supplementary p. & l. data" below statement. See also note (2) above.

⁵After collections on accounts previously charged off.

⁶Rental income from buildings and leaseholds not used in store operations (net after deduction of expenses exclusive of depreciation and amortization).

⁷Net cost of minor additions to furniture, fixtures, delivery and other equipment. See also note (c) below.

⁸For 1934, comprises: Addition to reserves for Federal income taxes and contingencies.

⁹In 1934 represents transfer from contingency reserve.

¹⁰1939: Includes \$278,242 refund of service purchased.

General Notes:—(a) Profits on installment sales are taken up in full when sales are made; however, provision is made for doubtful accounts, also for collection expense, loss of gross profit, unearned interest and carrying charges and for refundable carrying charges.

(b) Company has elected to report profits from installment sales on basis of collection for Federal income tax purposes.

(c) Book value of furniture, fixtures, delivery and other equipment (aggregating \$6,519,431) were reduced to \$1 each and deferred charges of \$202,100 were written off by charges to earned surplus during year ended Jan. 31, 1933. Above income account does not include charges for depreciation and amortization of these items. Had additions for depreciation and amortization and the costs in respect of net additions during year to furniture, fixtures, etc., been capitalized instead of being charged against earnings, net income for years ended Jan. 31 would have been: 1934, \$2,387,372; 1935, \$2,994,417; 1936, \$3,299,174; 1937, \$5,077,211; 1938, \$4,849,426; 1939, \$3,514,169; 1940, \$4,790,527.

Funded Debt

May Department Stores Co. 13¼% notes:

Issued \$5,000,000; outstanding, Jan. 31, 1941, \$5,000,000. All held by Irving Trust Co., New York, and National City Bank of Cleveland.

Due 1941 to 1948. Proceeds applied \$2,000,000 to payment of previously incurred bank indebtedness, and balance added to working capital.

Subsidiary Mortgage Debt

May Building Co. (O.):

31¼% sinking fund leasehold bonds, due Sept. 1, 1950; principal payments of \$186,000 annually commencing Sept. 1, 1943: Outstanding, Jan. 31, 1941, \$1,490,000.

Note dated Sept. 7, 1927, secured by first mortgage on new warehouse and patrons' garage properties in Cleveland, bearing interest at rate of 4%; payable \$26,000 annually each Sept. 1: Issued, \$1,250,000; outstanding, Jan. 31, 1941, \$712,100.

May Realty Co. (Md.):

Note dated Aug. 1, 1927, secured by first mortgage on real property owned by above company in Baltimore, Md., bearing interest at rate of 5%, principal payable \$26,000 F&A 1 of each year to Feb. 1, 1947, incl. and remaining sum payable on Aug. 1, 1947: Issued, \$2,600,000; outstanding, Jan. 31, 1941, \$1,066,000.

May-O'Neil Building Co.:

Note dated May 7, 1927, secured by first mortgage on real property owned by the company in Akron,

O. Due Sept. 1, 1950; payable \$53,250 annually each Mar. 1; interest at 4% per annum: Issued, \$2,500,000; outstanding, Jan. 31, 1941, \$1,408,750.

Capital Stock

1. May Department Stores Co. common; par \$10:

Authorized—2,500,000 shares; issued (including scrip equivalent to 20 shares), 1,367,352 shares; outstanding, 1,230,396 shares; in treasury, 136,956 shares; par \$10 (changed from \$100 par to \$50 par in Dec., 1922 and 2 new shares issued for each old share; changed to \$25 par Nov. 23, 1926 and 2 new shares issued for each old share; changed to \$10 par on a share for share basis April 18, 1933).

Dividend Record (in \$)

(Calendar Years)

(\$100 par shares)

1910	Nil	1911.....	1.00	1912.....	4.75
1913-14	5.00	1915-16.....	2.75	1917-18.....	5.00
1919	6.00	¹ 1920.....	7.75	² 1921-22.....	8.00

\$50 par shares after 2 for 1 stock split)

1923-25	5.00	1926.....	5.75
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(\$25 par shares after 2 for 1 stock split)

1927-28	4.00	³ 1929.....	3.50	⁴ 1930.....	2.00
1931	2.50	1932.....	1.40	⁵ 1933.....	0.25

(\$10 par shares after share for share exchange)

1933	0.75	1934-35.....	1.60	1936.....	2.75
1937-40	3.00	⁶ 1941.....	0.75		

¹Plus 33 1/3% in stock. ²Plus 30% in stock. ³Plus 11 1/4% in stock. ⁴Plus 5% in stock. ⁵Paid prior to capital change. ⁶75 cents Mar. 1, 1941.

Voting Rights—One vote per share.

Preemptive Rights—None except as exist under New York laws.

Listed—New York Stock Exchange. Unlisted trading on Cleveland Stock Exchange.

Transfer Agent—Irving Trust Co., New York.

Registrar—Lawyers Trust Co., New York.

Price range—	1940	1939	1938
Common	53½-36¾	53¾-40¾	53-28½

Subscription Rights: Stockholders of record Apr. 5, 1927 had right to subscribe to 104,000 shares of new common at \$55 per share to the extent of one new share for each 10 shares held; rights expired Apr. 26, 1927.

Stockholders of record Oct. 25, 1929, had the right to subscribe to 116,934 shares of additional stock at \$70 a share on basis of one new share for each ten shares held; rights expired Nov. 15, 1929; offering was underwritten by Goldman, Sachs & Co. and Lehman Brothers.

Capital Structure

Funded Debt

Issue	Rating	Amount Outstanding	Times		Interest Dates	Call Price	Price Range	
			Charges 1940	Earned 1939			1940	1932-40
1. 5½% sinking fund notes, 1937.....	Ca	\$1,487,500	.....	.....	{ M1-&-S	100	57-21	80¼-20
2. Conv. 6% s. f. debentures, 1941.....	Ca	4,457,000			{ M1&S	100½	62-16	84 -16

Capital Stock

Issue	Par Value	Amount Outstanding	Earned per Sh.		Divs. per Sh.		Call Price	Price Range	
			1940	1939	1940	1939		1940	1932-40
1. \$1 cumulative 1st preferred.....	no par	16,422 shs.	Nil	Nil	Nil	Nil	N.C.	4¾-4½	18 -4½
2. \$1.16⅔ cum. 2nd preferred.....	no par	4,692 shs.	Nil	Nil	Nil	Nil	N.C.	.....	.....
3. \$3 cumulative preferred	no par	40,907 shs.	Nil	Nil	Nil	Nil	\$55	12¾-3¾	38½-2
4. Common	no par	472,923 shs.	.....	.....	Nil	Nil	.....	21½- 1½	22¾- ¾

1Price range since 1938.

History

Incorporated in West Virginia Feb. 5, 1900. Various subsidiary corporations have been organized from time to time to carry on the business of the company in the United States and in foreign countries.

In 1927 the company accepted a contract to construct, with others, a central highway in Cuba, which was to extend for a distance of over 500 miles. This was part of a general public works program by the Cuban Government, and involved construction of various types of buildings, engineering projects, etc., in addition to the highway project. The work [illegible] other property \$4,448,707. In determining this valuation, the special master accepted company's figures of value of assets other than the Cuban bonds. This \$4,448,707 estimate of company was made as of Oct., 1940.

Valuation found for the Cuban bonds of \$4,829,265 is divided as follows: For the \$4,323,300 bonds of 1977 the master placed a value of 57, or a total of \$2,464,281, and for the \$4,379,600 bonds of 1955, a value of 54, or a total of \$2,364,984.

In a supplemental report Mr. Black found that company's probable earning capacity was \$647,099 per annum.

[Illegible]

Business & Products

This company has been rated as the largest road building organization in the world. The company's business has been international in scope, operations

having been conducted in North America, Argentina, Brazil, Chile, Guatemala, Colombia, Cuba, Poland, Hungary, Spain, Japan and Australia.

The business now carried on by the company is restricted to U. S. and Canada and is confined to the construction by contract of street and highway paving and work incidental thereto, although under its charter the company has powers to engage in general [illegible]

United States Circuit Court of Appeals for the
Ninth Circuit

Tax Court Docket No. 3992.

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, EVELYN HAMBURGER AND
JENNIE MARX, EXECUTRICES,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Circuit Court of Appeals For the Ninth Circuit:

Come now the petitioners above named and respectfully show:

I.

Nature of the Controversy

Belle Alice Hamburger Nathan died at Los Angeles, California on October 13, 1940. P. L. Nathan and Evelyn Hamburger were duly appointed and qualified as Executors of said decedent's estate.

They (as said Executors, duly filed the federal estate tax return (Form 706) with the Collector of Internal Revenue for the Sixth District of California.

Respondent determined a deficiency in the estate tax against petitioners in the sum of \$103,177.16.

This deficiency arose chiefly because respondent had increased the value of the gross estate. [446]

Petitioners filed an appeal with The Tax Court of the United States.

The case was tried at Los Angeles, California, on October 4th and 5th, 1945, before the Honorable Arthur J. Mellott, Judge of The Tax Court of the United States. Thereafter, and on or about December 8, 1945, Judge Mellott resigned as a Judge of The Tax Court of the United States, and the Honorable Byron B. Harlan thereafter was appointed Judge of The Tax Court of the United States and this case was assigned to him for decision.

Under date of July 17, 1946 The Tax Court of the United States, by Judge Harlan, promulgated its Memorandum Findings of Fact and Opinion. Under date of July 22, 1946 an order was made and entered amending said opinion. On the 16th day of August, 1946 petitioners filed with the Tax Court of the United States a Motion for Rehearing, a Motion for Reconsideration, and a Motion for Review by the Full Court of said opinion.

Each of said Motions was denied on the 16th day of August, 1946.

On December 31, 1946 The Tax Court of the United States entered its decision that there was a deficiency in estate tax due from petitioners in the amount of \$47,543.61.

The controversy involves a determination of the fair market value on October 13, 1941 of 425.817 shares of the capital stock of A. Hamburger & Sons

and 104.167 shares of the capital stock of Hamburger Realty Company.

Petitioners, in their estate tax return, placed a value of \$983.35 per share or \$418,735.66 for the 425.817 shares of A. Hamburger & Sons, and placed a value of \$2,113.55 per share, or [447] \$220,162.16 for the 104.167 shares of Hamburger Realty Company.

The respondent in his notice of deficiency valued the stock of A. Hamburger & Sons at \$1,200.00 per share, or \$510,980.40 for the 425.817 shares, and valued the stock of Hamburger Realty Company at \$4,850.00 per share, or \$505,209.95 for the 104.167 shares.

At the trial of the instant case respondent contended for \$1,000.00 per share for the stock of A. Hamburger & Sons and \$3,900.00 per share for the stock of Hamburger Realty Company.

Petitioners in their Amended Petition to Conform to Proof, claimed the value of the stock of A. Hamburger & Sons to be \$300.00 per share, or \$127,745.10 for the 425.817 shares, and claimed the value of the stock of Hamburger Realty Company to be \$1,300.00 per share, or \$135,417.10 for the 104.167 shares.

The 425.817 shares of stock of A. Hamburger & Sons and the 104.167 shares of stock of Hamburger Realty Company owned by decedent at the time of her death represented 11.28 per cent and 10.4167 per cent, respectively, of the total outstanding stock of the respective companies.

In compliance with the rule of The Tax Court of

the United States that facts be stipulated to the fullest extent, the parties agreed by stipulation as to the fair market value of all the underlying assets of each of said corporations, except the value of the stock of Hamburger Realty Company owned by A. Hamburger & Sons; the liabilities of each company; the earnings of and dividends paid by each company; the corporate organization, its capitalization and stock ownership.

Petitioners presented the testimony of two witnesses in regard to the inharmonious relations existing between the stockholders [448] and directors, the internal stagnation of the companies, lack of management, and the like.

There was no controversy between petitioners and respondent as to the underlying facts. The only controversy was the conclusion to be drawn from such facts with regard to the fair market value of the stocks in question and the method to be used in valuing said stocks.

The Tax Court of the United States in its Findings of Facts found the underlying facts as stipulated and as drawn from the uncontested testimony of Mr. Milliken, Mr. Mitchell, and Mr. Sharp, three witnesses called by petitioners, and who testified with regard to the disharmony existing between the directors and officers, the physical condition of the officers, and directors, the lack of management and business and investment policies, and certain insurance features of the lease to May Department Stores.

Petitioners presented the testimony of two wit-

nesses who qualified to give expert testimony on the question of the fair market value of the stocks involved herein. Each of said witnesses testified that marketable securities of very liquid companies were selling on the basic dates at substantial discounts below the fair market value of their underlying assets.

Each of the witnesses had studied and analyzed the stipulation of facts and the pertinent exhibits and heard the testimony of the petitioners' first three witnesses, and each had studied a copy of the hypothetical questions, which included all the facts in the case. These witnesses valued the stock of A. Hamburger & Sons at from \$300.00 to \$337.50 per share and valued the stock of Hamburger Realty Company at from \$1,750.00 to \$2,000.00 per share.

Each of the said witnesses took into account all the factors of valuation, i. e., earnings, dividends paid and payable, marketability of the stocks, net worth, the condition of the management, a comparison with other similar securities, market trends, the position of minority interests in said corporations, and other similar facts.

It was and is petitioners' claim that said stocks must be valued by a consideration and weighing of all said factors and that this method is the only method approved by the courts and respondent's own Regulations.

Respondent, however, claimed that the asset value was the only factor to be considered and produced a witness to so testify. The value of the total net assets of A. Hamburger & Sons was \$3,881,767.33

or \$1,027.00 per share, and the value of the total net assets of Hamburger Realty Company was \$3,927,153.64 or \$3,927.15 per share. Respondent's witness testified that the \$1,027.00 and \$3,927.00 respectively were the fair market values of the respective securities, but he reduced them to round figures of \$1,000.00 and \$3,900.00, respectively, because such stocks sold at round figures.

Judge Harlan, who did not hear the witnesses, found as a fact that the value of A. Hamburger & Sons stock was \$1,000.00 per share and that the value of Hamburger Realty Company stock was \$3,900.00 per share, and would have found a somewhat larger value based on the net worth of the corporations, had not respondent contended for such values as found.

Judge Harlan affirmatively states that he used the fair market value of the assets as the sole factor in determining the value of the respective stocks here involved. [450]

In so doing, Judge Harlan states that the methods contended for by petitioners, i. e., consideration of all the factors, and the method contended for by respondent, i. e., earnings and asset value, would be resolved. He resolves the contention in favor of respondent and then eliminates, on erroneous assumptions, the earnings factor from respondent's theory, and accepts as the only method of valuing the stocks herein involved the net worth method.

The erroneous assumptions which petitioners claim Judge Harlan made are (1) that the two corporations had abnormal systems of paying dividends

whereby the stockholders profited more from receiving the use of the assets of the corporation to their own profit than they would have profited by receiving normal dividends. Yet, Judge Harlan's findings of fact show that almost to the penny the net earnings of the corporations, after federal income tax, was paid to the stockholders as dividends; (2) that there was \$384,000.00 in "open accounts," as shown on the balance sheet of A. Hamburger & Sons, which reflects a use of the assets by the stockholders. The correct amount of "open accounts," as shown in Judge Harlan's findings of fact, is \$322,539.62, and these were anticipations of the dividends for said year, as shown by the findings of fact; (3) that the so-called use of A. Hamburger & Sons assets by way of loans to the stockholders also obtained in Hamburger Realty Company. Judge Harlan's finding with respect to the balance sheet of said company does not reflect a single loan to a stockholder; (4) that during the years 1940 and 1941 there were ample bonds paying 4 per cent and of extremely high security. There is no evidence of this anywhere in the record. The 4 $\frac{1}{4}$ per cent 1947-1952 United States [451] Treasury Bond shown in A. Hamburger & Sons portfolio would yield only 3.6 per cent on its October 13, 1941 value. (5) That the loans could easily have been invested at 4 per cent to yield \$69,000.00 which, after taxes, would have left \$50,000.00 available for dividends. The tax rate for 1941 was 31 per cent and excess profit tax rate for incomes over \$25,000.00 was 55 per cent. Such tax rates applied

to the said gross yield would have reduced the amount available for dividends to approximately \$21,000.00. (6) That valuing the May Department Store Building at a fixed capitalization of income is the equivalent of using the actual earnings of the corporation as a factor in determining the value of the stock.

Petitioners aver that in the record and proceedings before The Tax Court of the United States, in the denial of petitioners' Motions, and in the opinion and decisions rendered by The Tax Court of the United States, manifest error occurred and intervened to the prejudice of petitioners, who now assign the following points on which petitioners intend to rely in this proceeding:

The Tax Court of the United States Erred:

(A) In determining and deciding without any evidence or substantial evidence in support thereof a value of \$1,000.00 per share for the stock of A. Hamburger & Sons.

(B) In determining and deciding, without any evidence or substantial evidence in support thereof, a value of \$3,900.00 per share for the stock of Hamburger Realty Company.

(C) In denying petitioners' Motion for Rehearing.

(D) In denying petitioners' Motion for Reconsideration.

(E) In denying petitioners' Motion for Review by the Full [452] Court of the Opinion entered on July 17, 1946.

(F) In determining and deciding contrary to the evidence and to the findings of fact that the dividend paying policy of A. Hamburger & Sons was abnormal.

(G) In determining and deciding contrary to the evidence and the findings of fact that the system of paying dividends by A. Hamburger & Sons to stockholders profited the stockholders more from receiving the use of the assets of the corporation to their own individual profit than they would have profited by receiving normal dividends.

(H) In determining and deciding without any evidence and contrary to the findings of fact that the assets of A. Hamburger & Sons could have been invested in bonds on the market returning four per cent interest and of extremely high security.

(I) In failing to determine and decide that the open accounts to stockholders shown on the balance sheet of A. Hamburger & Sons was a mere anticipation of the dividends to be declared by said company for the year 1941.

(J) In determining and deciding that an amount equivalent to the loans to stockholders shown on the balance sheet of A. Hamburger & Sons could have been invested to yield the corporation a four per cent return thereon.

(K) In determining and deciding that a four per cent yield on an amount equivalent to the loans to stockholders shown on the balance sheet of A. Hamburger & Sons would have equaled \$50,000.00 more income available for dividends.

(L) In failing to determine and decide, as found in the findings of fact, that the very reasons de-

terminated and decided as [453] eliminating the earnings factor and dividend paying factor as valuation factors, would have been of prime importance to a purchaser of a minority stock interest in A. Hamburger & Sons.

(M) When determining the fair market value of the stock of A. Hamburger & Sons, in failing to take into consideration:

- (1) The company's earning power;
- (2) The company's dividend-paying capacity;
- (3) The marketability of the stock;
- (4) The testimony of expert witnesses;
- (5) The status of the management, present and future;
- (6) The comparison with other securities;
- (7) The fact that the interest here to be valued is a minority interest;
- (8) The trend of the market and economic conditions;
- (9) All other relevant factors having a bearing upon the stock and the value thereof, as required by respondent's regulations and established court decisions, including net worth.

(N) In determining and deciding that the per share fair market value of the stock of A. Hamburger & Sons was a sum equivalent to the value of its net assets divided by the number of its outstanding shares.

(O) In determining and deciding that the business operations of A. Hamburger & Sons were abnormal.

(P) In determining and deciding contrary to the evidence and to the findings of fact that the dividend paying policy of Hamburger Realty Company was abnormal. [454]

(Q) In determining and deciding contrary to the evidence and the findings of fact that the system of paying dividends by Hamburger Realty Company to stockholders profited the stockholders more from receiving the use of the assets of the corporation to their own individual profit than they would have profited by receiving normal dividends.

(R) In failing to determine and decide, as found in the findings of fact, that the very reasons determined and decided as eliminating the earnings factor and dividend-paying factor as valuation factors, would have been of prime importance to a purchaser of a minority stock interest in Hamburger Realty Company.

(S) When determining the fair market value of the stock of Hamburger Realty Company, in failing to take into consideration:

- (1) The Company's earning power;
- (2) The Company's dividend-paying capacity;
- (3) The marketability of the stock;
- (4) The testimony of expert witnesses;
- (5) The status of the management, present and future;
- (6) The comparison with other securities;
- (7) The fact that the interest here to be valued is a minority interest;

(8) The trend of the market and economic conditions;

(9) All other relevant factors having a bearing upon the stock and the value thereof, as required by respondent's regulations and established court decisions, including net worth.

(T) In determining and deciding that the per share fair market value of the stock of Hamburger Realty Company was a sum [455] equivalent to the value of its net assets divided by the number of its outstanding shares.

(U) In determining and deciding that the business operations of Hamburger Realty Company were abnormal.

(V) When, in determining and deciding the value of the Hamburger Realty Company stock, it eliminated the earnings factor because the value of the May Company building had been determined by capitalizing the lease rentals.

(W) In determining and deciding that the cases of *Melville Hanscom*, 24 B.T.A. 173; *Estate of Henry E. Huntington*, 36 B.T.A. 698; and *Bank of California v. Commissioner*, 173 Fed (2d) 428, are authority or even persuasive in the instant case.

(X) In failing to give effect to Section 81.10 of Respondent's Regulations 105.

(Y) In failing to give effect to the purchasers' views in determining fair market value.

(Z) In giving effect only to the sellers' views in determining fair market value.

(AA) In determining and deciding the fair

market value of the stocks involved contrary to law.

(BB) In determining and deciding the fair market value of the stocks involved contrary to its Findings of Fact.

(CC) In rendering a decision contrary to law.

(DD) In rendering a decision contrary to its Findings of Fact. [456]

II.

The Court in Which Review is Sought

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court of The United States is sought, pursuant to the provisions of section 1141 of the Internal Revenue Code.

III.

Venue

The denials of petitioners' Motions for Rehearing, Reconsideration, for Review by the Full Tax Court of the United States, were entered August 16, 1946. The final decision of The Tax Court of The United States determining a deficiency was entered on December 31, 1946.

Belle Alice Hamburger Nathan was for many years a resident of the County of Los Angeles, State of California, and died therein on October 13, 1940. Her Last Will and Testament was duly admitted to probate in the Superior Court of the State of California, in and for the County of Los Angeles.

P. L. Nathan and Evelyn Hamburger were duly appointed and qualified as Executors of her Last Will and Testament. Both have been residents of the County of Los Angeles, California, for many years. P. L. Nathan died in 1946 and Jennie Marx was duly appointed and qualified as Co-Executrix of the Last Will and Testament of Belle Alice Hamburger Nathan, deceased. Evelyn Hamburger and Jennie Marx are the acting Executrices of her estate.

The federal estate tax return, Form 706, for said estate was duly filed with the United States Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, and within the Ninth Judicial Circuit of [457] the United States.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, petitioners pray that the denial of petitioners' Motions and the decision of The Tax Court of the United States herein be reviewed by the United State Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken, to the end that the errors complained of may be reviewed and corrected by said Court.

Dated March 22nd, 1947.

/s/ CLAUDE I. PARKER,
/s/ RALPH W. SMITH,
/s/ J. EVERETT BLUM,
/s/ L. A. LUCE,

Counsel for Petitioners. [458]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To John P. Wenchel, Chief Counsel, Bureau of
Internal Revenue, Washington, D. C.:

You Are Hereby Notified that the petitioners, on the 25th day of March, 1947, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above-entitled cause, and of its denial of petitioners' Motions for Rehearing, Reconsideration and Review by the Full Court. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 25th day of March, 1947.

/s/ CLAUDE I. PARKER,
/s/ RALPH W. SMITH,
/s/ J. EVERETT BLUM,
/s/ L. A. LUCE,

Counsel for Petitioners. [459]

Personal service of the foregoing Notice, together with a copy of the Petition for Review is hereby acknowledged this 25th day of March, 1947.

/s/ J. P. WENCHEL, CAR
Chief Counsel, Bureau of Internal Revenue, Counsel
for Respondent. [460]

The Tax Court of The United States

Docket No. 3992

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, P. L. NATHAN, et al., Executors,
505 South Windsor Boulevard, Los Angeles,
California,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION TO AMEND THE TITLE OF THE
ABOVE-ENTITLED ACTION ON APPEAL

Come now the petitioners above-named by their attorneys of record and move this Honorable Court for its order amending the Petition for Review of Decision of the Tax Court of the United States, the Notice of Filing Petition for Review, Petitioners' Designation of Contents of Record on Review, and the Petitioners' Statement of Points to be Relied

Upon and Designation of Parts of Record to be Printed, by substituting for the title in said papers heretofore filed herein the following:

“Estate of Belle Alice Hamburger Nathan, Evelyn Hamburger, Executrix, Petitioner.”

That said motion is based upon the following grounds:

That upon the admission of the Will of Belle Alice Hamburger Nathan to probate in the Superior Court of the State of California in and for the County of Los Angeles, P. L. Nathan and Evelyn Hamburger were appointed co-executors of said Last Will and Testament. That thereafter, and during the year 1946, P. L. Nathan died, leaving Evelyn Hamburger as the Executrix of said Last Will and Testament. [461]

That said Last Will and Testament provided that upon the death of P. L. Nathan or Evelyn Hamburger, Jennie Marx should be appointed so-executrix of said Last Will and Testament.

That J. Everett Blum, one of petitioners' attorneys, who prepared said appeal papers, misunderstood the statement of the attorneys representing the estate in the Court in which said Will is being probated to the effect that Jennie Marx had been appointed such co-executrix, whereas the information should have been that Jennie Marx was named as such succeeding executrix but had not yet been appointed or qualified. That the affidavit of J. Everett Blum is hereto attached and marked exhibit A.

Dated this 27th day of March, 1947.

Respectfully submitted,

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

/s/ L. A. LUCE,

Counsel for Petitioners. [462]

Personal service of the foregoing Motion to Amend and Affidavit of J. Everett Blum is hereby acknowledge this 31st day of March, 1947.

/s/ J. P. WENCHEL, C.A.R.,

Chief Counsel, Bureau of Internal Revenue, Counsel
for Respondent.

[Endorsed]: Filed and granted Mar. 31, 1947.
Signed Eugene Black, Judge. [463]

[Title of Tax Court and Cause.]

AFFIDAVIT OF J. EVERETT BLUM IN SUP-
PORT OF MOTION TO AMEND THE
TITLE OF THE ABOVE-ENTITLED PRO-
CEEDING AND IN SUPPORT OF MOTION
TO AMEND THE PETITION FOR RE-
VIEW OF DECISION OF THE TAX
COURT OF THE U. S.

State of California,
County of Los Angeles—ss.

I, J. Everett Blum, being first duly sworn, deposes
and says: That he is one of the attorneys for the

above-named petitioners and was one of the attorneys during the proceedings before the Tax Court of the United States.

That P. L. Nathan, co-executor of the Last Will and Testament of Belle Alice Hamburger Nathan, died during the year 1946; that Evelyn Hamburger, who with said P. L. Nathan was a co-executrix of the Last Will and Testament of said decedent, is the duly appointed, qualified and acting executrix of the Last Will and Testament of said decedent. That in said Last Will and Testament Jennie Marx is named as a succeeding executrix in the event of the death of either said P. L. Nathan or Evelyn Hamburger. That said Jennie Marx is not as yet appointed as such succeeding executrix, nor has she qualified, nor is she acting as such. [464]

That affiant was misinformed at the time that he prepared said Petition for Review and accompanying documents to the effect that Jennie Marx had been so appointed, and for that reason made the statements in said Petition for Review under Article 3 entitled Venue, but that in truth and in fact Evelyn Hamburger is the sole appointed qualified and acting executrix.

Dated this 27th day of March, 1947.

/s/ J. EVERETT BLUM.

Subscribed and sworn to before me this 27th day of March, 1947.

[Seal] ENID ARCHER,
Notary Public in and for the County of Los Angeles,
State of California. [465]

[Title of Tax Court and Cause.]

MOTION TO AMEND PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Come now the petitioners above-named, by their attorneys of record, and move this Honorable Court for its order amending the Petition for Review of Decision of the Tax Court of the United States in the following particulars, to-wit:

That on Page 12 thereof under Section 3 Venue to substitute for the words "P. L. Nathan died in 1946 and Jennie Marx was duly appointed and qualified as co-executrix of the Last Will and Testament of Belle Alice Hamburger Nathan, deceased. Evelyn Hamburger and Jennie Marx are the acting Executrices of of the Estate"

the following words, to wit:

"P. L. Nathan died in 1946 and Evelyn Hamburger is the duly appointed, qualified and acting executrix of the Last Will and Testament of Belle Alice Hamburger Nathan, deceased."

That said motion will be based on the affidavit of J. Everett Blum attached to the motion concurrently filed herewith to amend the title of the above entitled [466] action, which said affidavit is referred to and incorporated herein as if said affidavit were set out herein in full.

Dated this 27th day of March, 1947.

Respectfully submitted,

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

/s/ L. A. LUCE,

Counsel for Petitioners.

Personal service of the foregoing Motion is hereby acknowledged this 31st day of March, 1947.

/s/ J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

[Endorsed]: Filed and granted March 31, 1947.
Signed Eugene Black, judge. [467]

[Title of Tax Court and Cause.]

PETITIONER'S DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of The United
States:

The petitioner hereby designates for inclusion in the record on review in the above-entitled proceeding the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g)

of Rule 75 of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of all proceedings before the Tax Court.
2. Pleadings before the Tax Court.
 - (a) Petition, including attached copy of deficiency letter;
 - (b) Amended petition to conform to proof;
 - (c) Answer to Petition;
 - (d) Answer to Amended Petition;
3. The Memorandum Findings of Fact and Opinion of the Tax Court.
4. Order entered July 22, 1946, Amending Opinion of July 17, 1946.
5. Motion for Rehearing and denial thereof.
6. Motion for Reconsideration and denial thereof.
7. Motion for review by Full Court and denial thereof.
8. The decision of the Tax Court. [468]
9. The official transcript of oral testimony and the whole thereof.
10. Respondent's Exhibits A, C, D, E and F, introduced in evidence at the hearing before the Tax Court.
11. Stipulation of Facts with Exhibits 1 to 9 inclusive, thereto attached.
12. The Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit.
13. Notice of Filing of Petition for Review, to-

gether with Proof of Service thereof, and of service of a copy of the Petition for Review.

14. Petitioner's motion to amend the title of this cause, with the attached affidavit of J. Everett Blum, together with the Order of the Tax Court entered thereon.

15. Petitioner's motion to amend petition for review of decision of The Tax Court of the United States, together with order of the Tax Court entered thereon.

16. This designation of contents of record on review.

17. Petitioner's statement of points and designation of contents of the record to be printed.

Dated April 4, 1947.

/s/ CLAUDE I. PARKER, LAL

/s/ RALPH W. SMITH, LAL

/s/ J. EVERETT BLUM, LAL

/s/ L. A. LUCE,

Counsel for Petitioner.

Service of a copy of the within designation is hereby admitted and agreed to this 4th day of April, 1947.

/s/ J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue,

Attorney for the

Respondent.

Filed April 15, 1947. [469]

United States Circuit Court of Appeals
for the Ninth Circuit

Tax Court Docket
No. 3992

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, EVELYN HAMBURGER and
JENNIE MARX, Executrices,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S STATEMENT OF POINTS TO
BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED.

Come now the petitioners for review in the above entitled cause, by and through their counsel, and state that the points upon which they intend to rely in this case are as follows:

The Tax Court of the United States erred:

(A) In determining and deciding without any evidence or substantial evidence in support thereof a value of \$1,000.00 per share for the stock of A. Hamburger & Sons.

(B) In determining and deciding, without any evidence or substantial evidence in support thereof, a value of \$3,900.00 per share for the stock of Hamburger Realty Company.

(C) In denying petitioners' Motion for Rehearing.

(D) In denying petitioners' Motion for Reconsideration.

(E) In denying petitioners' Motion for Review by the Full Court of the Opinion entered on July 17, 1946.

(F) In determining and deciding contrary to the evidence [470] and to the findings of fact that the dividend paying policy of A. Hamburger & Sons was abnormal.

(G) In determining and deciding contrary to the evidence and the findings of fact that the system of paying dividends by A. Hamburger & Sons to stockholders profited the stockholders more from receiving the use of the assets of the corporation to their own individual profit than they would have profited by receiving normal dividends.

(H) In determining and deciding without any evidence and contrary to the findings of fact that the assets of A. Hamburger & Sons could have been invested in bonds on the market returning four per cent interest and of extremely high security.

(I) In failing to determine and decide that the open accounts to stockholders shown on the balance sheet of A. Hamburger & Sons was a mere anticipation of the dividends to be declared by said company for the year 1941.

(J) In determining and deciding that an amount equivalent to the loans to stockholders shown on the balance sheet of A. Hamburger & Sons could have been invested to yield the corporation a four per cent return thereon.

(K) In determining and deciding that a four

per cent yield on an amount equivalent to the loans to stockholders shown on the balance sheet of A. Hamburger & Sons would have equaled \$50,000.00 more income available for dividends.

(L) In failing to determine and decide, as found in the findings of fact, that the very reasons determined and decided as eliminating the earnings factor and dividend paying factor as valuation factors, would have been of prime importance to a [471] purchaser of a minority stock interest in A. Hamburger & Sons.

(M) When determining the fair market value of the stock of A. Hamburger & Sons, in failing to take into consideration:

- (1) The company's earning power;
- (2) The company's dividend-paying capacity;
- (3) The marketability of the stock;
- (4) The testimony of expert witnesses;
- (5) The status of the management, present and future;
- (6) The comparison with other securities;
- (7) The fact that the interest here to be valued is a minority interest;
- (8) The trend of the market and economic conditions;
- (9) All other relevant factors having a bearing upon the stock and the value thereof, as required by respondent's regulations and established court decisions, including net worth.

(N) In determining and deciding that the per

share fair market value of the stock of A. Hamburger & Sons was a sum equivalent to the value of its net assets divided by the number of its outstanding shares.

(O) In determining and deciding that the business operations of A. Hamburger & Sons were abnormal.

(P) In determining and deciding contrary to the evidence and to the findings of fact that the dividend paying policy of Hamburger Realty Company was abnormal. [472]

(Q) In determining and deciding contrary to the evidence and the findings of fact that the system of paying dividends by Hamburger Realty Company to stockholders profited the stockholders more from receiving the use of the assets of the corporation to their own individual profit than they would have profited by receiving normal dividends.

(R) In failing to determine and decide, as found in the findings of fact, that the very reasons determined and decided as eliminating the earnings factor and dividend-paying factor as valuation factors, would have been of prime importance to a purchaser of a minority stock interest in Hamburger Realty Company.

(S) When determining the fair market value of the stock of Hamburger Realty Company, in failing to take into consideration:

- (1) The company's earning power;
- (2) The company's dividend-paying capacity;

- (3) The marketability of the stock;
- (4) The testimony of expert witnesses;
- (5) The status of the management, present and future;
- (6) The comparison with other securities;
- (7) The fact that the interest here to be valued is a minority interest;
- (8) The trend of the market and economic conditions;
- (9) All other relevant factors having a bearing upon the stock and the value thereof, as required by respondent's regulations and established court decisions, including net worth.

(T) In determining and deciding that the per share fair market value of the stock of Hamburger Realty Company was a sum equivalent to the value of its net assets divided by the number of its outstanding shares.

(U) In determining and deciding that the business operations of Hamburger Realty Company were abnormal.

(V) When, in determining and deciding that value of the Hamburger Realty Company stock, it eliminated the earnings factor because the value of the May Company building had been determined by capitalizing the lease rentals.

(W) In determining and deciding that the cases of *Melville Hanscom*, 24 B.T.A. 173; *Estate of Henry E. Huntington*, 36 B.T.A. 698; and *Bank of California v. Commissioner*, 173 Fed. (2d) 428, are authority or even persuasive in the instant case.

(X) In failing to give effect to Section 81.10 of Respondent's Regulations 105.

(Y) In failing to give effect to the purchasers' views in determining fair market value.

(Z) In giving effect only to the sellers' views in determining fair market value.

(AA) In determining and deciding the fair market value of the stocks involved contrary to law.

(BB) In determining and deciding the fair market value of the stocks involved contrary to its Findings of Fact.

(CC) In rendering a decision contrary to law.

(DD) In rendering a decision contrary to its Findings of Fact. [474]

Petitioners hereby designate the entire record as certified to the Clerk of the above entitled Court, as necessary to be printed for the consideration of the points set forth above. Petitioners also designate this Statement of Points and Designation as necessary to be printed.

Dated March 22, 1947.

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

/s/ L. A. LUCE,

Counsel for Petitioners.

Personal service of a copy of the foregoing State-

ment of Points and Designation is hereby acknowledged this day of, 1947.

/s/ J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

Filed T.C.U.S. March 25, 1947. [475]

The Tax Court of the United States
Washington

Docket No. 3992

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, EVELYN HAMBURGER,
Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 475, inclusive, contain and are a true copy of the transcript of records, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of May, 1947.

[Seal] /s/ VICTOR S. MERSCH, EMT
Clerk,
The Tax Court of the
United States.

[Endorsed]: No. 11625. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Belle Alice Hamburger Nathan, Evelyn Hamburger, Executrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed May 12, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11625.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF BELLE ALICE HAMBURGER NATHAN, EVELYN
HAMBURGER, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

CLAUDE I. PARKER,

808 Bank of America Building, Los Angeles 14,

RALPH W. SMITH,

919 Oviatt Building, Los Angeles 14,

J. EVERETT BLUM,

810 South Spring Street, Los Angeles 14,

L. A. LUCE,

937 Munsey Building, Washington, D. C.,

Counsel for Petitioner.

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No. 11625.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF BELLE ALICE HAMBURGER NATHAN, EVELYN
HAMBURGER, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Jurisdiction.

This petition has been filed to review a decision of The Tax Court of the United States involving the federal estate tax liability of Petitioner.

Notice of deficiency was mailed to Petitioner on December 27, 1943 [R. 10], and the petition for redetermination of the deficiency was filed with The Tax Court on February 9, 1944. [R. 5-17.] The petition was filed pursuant to Section 1012(a) of the Internal Revenue Code.

The Memorandum Findings of Fact and Opinion of The Tax Court, which is not reported, was entered on July 17, 1946 [R. 36-59], and an order amending said Memorandum Findings of Fact and opinion was entered July

22, 1946. [R. 59-60.] On August 15, 1946, Petitioner filed motions for rehearing, for reconsideration, and for review by the full Tax Court, all of which were denied on August 19 and 20, 1946. [R. 60-67.] The decision of The Tax Court was entered on December 31, 1946. [R. 67-68.] Petition for review was filed and notice thereof served upon counsel for Respondent on March 25, 1947. [R. 477-492.]

The federal estate tax return (form 706) for the above named estate was filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. [R. 36 and 375.] The petition for review was filed pursuant to Section 1142 and jurisdiction is invoked under Section 1141 of the Internal Revenue Code.

Questions Presented.

1. Whether The Tax Court erred as a matter of law in valuing the stocks of Hamburger Realty Company and A. Hamburger & Sons at \$3900.00 and \$1000.00 per share, respectively, in any of the following particulars: a lack of any substantial evidence or evidence legally sufficient to sustain its findings of value; a failure to consider relevant factors, such as: past and prospective earnings, dividend paying capacity, lack of marketability, lack of management (present and prospective), failure to consider that the number of shares of stock of each corporation involved herein constitutes a minority interest, anticipated income tax burdens, economic conditions prevailing on the basic date and all other relevant factors; failure to assume the existence of hypothetical willing purchasers and sellers; an arbitrary and unreasonable disregard of the testimony of expert witnesses; failure to

base its conclusions (opinion) and decision on its findings of fact.

2. Whether The Tax Court's conclusions (Opinion) and decision are contrary to its Findings of Fact.

3. Whether The Tax Court's conclusions (Opinion) and decision are contrary to law.

4. Whether The Tax Court abused its discretion in denying Petitioner's Motions for Rehearing, for Reconsideration and for Review by the Full Court.

Statutes and Regulations Involved.

Internal Revenue Code, Section 811:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) To the extent of the interest therein of the decedent at the time of his death;

"(j) If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, . . ."

Treasury Regulations 105; Sec. 81.10:

"(a) General.—The value of every item of property includible in the gross estate is the fair market value thereof . . . The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. . . .

* * * * *

“(c) Stocks and Bonds.—The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date.

“If actual sales or *bona fide* bid and asked prices are not available, then, . . . in the case of shares of stock, upon the basis of the company’s net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock”

Statement.

INTRODUCTORY.

The Tax Court was called upon to determine the fair market value of shares of stock of two corporations, Hamburger Realty Company and A. Hamburger & Sons, Inc.

Belle Alice Hamburger Nathan died on October 13, 1940. The executors of her Last Will and Testament elected to have the assets of her estate valued on the optional date of October 13, 1941, as authorized by Section 811(j) of the Internal Revenue Code. The basic date is therefore October 13, 1941. The Federal Estate Tax Return, Form 706, was duly filed with the Collector of Internal Revenue, Sixth District of California, and the tax shown thereon to be due was paid concurrently therewith. [R. 36, 374 and 375.]

Among the assets owned by the decedent at the time of her death were 425.817 shares of stock of A. Hamburger & Sons, Inc., and 104.167 shares of stock of Hamburger Realty Company. In the Federal Estate Tax Return decedent’s shares of stock in A. Hamburger & Sons, Inc. were valued at \$983.35 per share and decedent’s

shares of stock in Hamburger Realty Company were valued at \$2113.55 per share. [R. 37.] Respondent in his notice of deficiency determined that said shares of stock had values of \$1200.00 and \$4850.00 per share, respectively. [R. 37.] Respondent subsequently reduced his determination of the value of said shares of stock to \$1000.00 and \$3900.00 per share, respectively. [R. 37.] Petitioners below filed an amended petition to conform to proof, wherein said shares of stock were valued at \$300.00 and \$1300.00 per share, respectively. [R. 20-33 and 37.] The Tax Court found the value of said shares of stock to be \$1000.00 and \$3900.00 per share, respectively. [R. 53.]

The stock of each of said corporations was owned by members of the Hamburger family and each of said corporations is a closed family corporation. No shares of stock of either of said corporations have ever been sold. [R. 39.]

On the basic date, the president, general and executive manager of said corporations was David A. Hamburger, aged 84 years; the vice-president of said corporations was Evelyn Hamburger, aged 72 years; the secretary-treasurer of said corporations was P. L. Nathan, aged 76 years, and Jennie H. Marx was 81 years of age. [R. 39.]

For several years prior to the basic date the said David A. Hamburger had been ill and almost continuously confined to his bed and the said P. L. Nathan had been in poor physical condition and showing signs of senility. Neither Evelyn Hamburger nor Jennie H. Marx had any business experience prior to the basic date. None of the children had any business experience. [R. 51.]

The management on the basic date had not trained nor attempted to train any younger people to take over the management or operation of either of said corporations. [R. 52.]

For many years prior to and subsequent to the basic date there were severe inharmonious relations existing between the stockholders and directors of each of said corporations, which seriously affected adversely the formation of any business or financial or investment policy of either corporation, to the end that such policies remained in *status quo* and stagnated. Each of the individual stockholders had his or her own separate attorney advising him or her in connection with the affairs of said corporations. [R. 52.]

The shares of stock of each of said corporations on the basic date were not attractive to banks as security for a loan. [R. 52.]

The stockholder members of the Hamburger family, by reason of being stockholders, had advantages such as borrowing money at a low rate of interest from the corporations, which they could not have borrowed from other sources on the same collateral. This advantage would not necessarily have been available to the purchaser of the minority interests in the said corporations. [R. 52-53.]

THE STOCK OF A. HAMBURGER & SONS, INC.

A. Hamburger & Sons, Inc., was a California corporation. It had issued and outstanding 3774.183 shares of common stock of a par value of \$1000.00 each. [R. 37.]

On the basic date the stock was owned as follows: 425.817 shares by petitioner; 425.817 shares by Evelyn Hamburger; 425.817 shares by Jennie H. Marx or by a Trust created by her; 1248.366 shares by David A. Hamburger Corporation; 1248.366 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased. [R. 38.]

A. Hamburger & Sons, Inc., owned 29 parcels of real estate, U. S. Treasury Bonds and Certificates, Mortgages and Trust Deeds, other bonds and stocks, 104.167 shares of stock of Hamburger Realty Company, and indebtedness due from affiliated corporation and from officers and stockholders. It had liabilities of \$555,116.55. [R. 43-47.]

The parties stipulated the fair market value on the basic date of all assets and liabilities of A. Hamburger, except its 104.167 shares of stock of Hamburger Realty Company (the value of which was to be determined by The Tax Court and inserted in the balance sheet). [R. 374, 376, 385-389 [Ex. 4].] The Tax Court found the value of the assets and liabilities as stipulated and determined the value of the Hamburger Realty Company stock. [R. 43-47.]

The total fair market value of the assets was \$4,-436,883.88 and the total liabilities were \$555,116.55, leaving a net worth of \$3,881,767.33 (using the value found by The Tax Court for the Hamburger Realty Company stock). [R. 47.] Dividing the net worth by the 3,774.183 shares results in a net worth per share of \$1028.50. The Tax Court determined that the fair market value of the A. Hamburger & Sons, Inc., stock was \$1,000.00 per share and would have determined "a some-

what larger valuation" had the respondent not asked for a value of \$1,000.00 per share. [R. 59-60.]

The indebtednesses due from stockholders arose out of legal complications in a dispute between members of the Hamburger family involving a contest of the Will of Moses Hamburger, who died sometime prior to 1935. [R. 79, 80, 83, 93.] Each member of the family was represented by a different attorney, who, between them, finally settled the dispute. [R. 81.]

The parties stipulated the earnings, expenses, federal income taxes, and net income after taxes, of A. Hamburger & Sons, Inc., for the years 1936 to 1943, both inclusive, and the dividends paid during those years. [R. 374-376, 390-391, 48-50.] A comparison of the dividends paid and the net income after provision for federal income taxes shows that all of the net income was paid out as dividends. Indeed, the stockholders anticipated the earnings of the company and borrowed the earnings during the current year against the declaration and payment of dividends. [R. 52.] The total net income available for dividends for said years was \$2,061,137.78 and total dividends paid for said years was \$2,292,606.59. The average earnings per share for that period were \$68.26. The average dividends paid per share for said period were \$75.93. For the year 1941 the corresponding figure was \$66.60.

The principal source of income to A. Hamburger & Sons, Inc., was the May Co. lease. A. Hamburger & Sons, Inc., leased from Hamburger Realty Co. property situated at Broadway, Eighth and Hill Streets in Los Angeles, California, which lease terminated on December 31, 1942. The annual rental was \$250,000.00. On

March 30, 1923 A. Hamburger & Sons, Inc., subleased said property to the May Department Stores Company for a term of years, terminating December 31, 1942 for a total rental of \$10,355,625.60 payable \$43,148.44 per month. The annual rental was \$517,781.28 which, after deducting the rental payable by A. Hamburger & Sons, Inc., produced an annual income of \$267,781.28. [R. 50.] Thus on the basic date it was known that the past earnings would constitute no basis for determining the future earnings. This is borne out by the earnings for the year 1943, when net earnings after taxes amounted to \$74,637.23, or approximately \$20.00 per share. [R. 49.] The evidence thus established a reasonably reliable estimate of prospective earnings.

Substantial increases in costs, particularly in federal income taxes, were seen as inevitable on October 13, 1941. [R. 135.] The Excess Profits Tax Act and the Defense Tax Act had been enacted in 1940 and the Excess Profits Tax Act had been amended in 1941. Corporation tax rates increased from a high of 24 per cent in 1940 to a high of 31 per cent in 1941, and excess profits tax rates had been increased 10 per cent in each bracket in 1941 over 1940.

The uncontradicted and unquestioned testimony of witnesses established the fact that representative stocks were selling in a range of prices which, on dividends paid, yielded from 5.61 per cent to 10 per cent or from 10 to about 18 times dividends. The yield on Dow-Jones average on industrial stock was about 6.2 per cent on the basic date and the stock was selling at an average of 10.5 times earnings. [R. 130-131, 152, 175, 176.] But in determining the value of the stock of A. Hamburger

& Sons, Inc., past average earnings had to be modified to reflect the loss of the May Co. rentals fourteen months subsequent to the basic date.

Mr. Eitner and Mr. Walker testified that after the loss of the May Co. lease, expected future earnings and dividends would be about \$25.00 per share and capitalized that figure at ten and seven times earnings, respectively. They then each added to such figures the present worth as of the basic date of the dividends to be received for the years 1941 and 1942 based on the actual earnings for the year 1941, which included the May Co. lease rentals. They thus arrived at values of \$337.50 and \$297.66 per share, respectively. [R. 148-152, 199-201.]

The atmosphere of the stock market was one of uncertainty and fear, caused by unfavorable developments in Europe, concern of the possible entry of the United States in the war, and the certainty of higher taxes. The stock market was on a downward trend. [R. 143, 176.] Investors were demanding liquidity. The stocks of leading investment trusts were selling on the stock exchange from 25 per cent to 34 per cent below the fair market value of their net worth. Real estate securities sold in Los Angeles, California in 1941 from 50 to 80 per cent of the fair market value of their net worth and for six times earnings. [R. 159, 219.]

Respondent produced one witness who testified to a value of \$1029.29, arrived at by dividing the net worth of the company by the number of outstanding shares. He then rounded the figure to \$1000.00, because stocks such as this sell in round figures. [R. 263, 269, 285, 286.] The Tax Court found a value of \$1000.00 solely on asset value. [R. 58-59.]

THE STOCKS OF HAMBURGER REALTY COMPANY.

Hamburger Realty Company was a California corporation having issued and outstanding 1000 shares of common stock of \$1000.00 par value each. On the basic date the stock was owned as follows: 104.167 shares by the Estate of Belle A. H. Nathan; 104.167 shares by Evelyn Hamburger; 104.167 shares by Jennie H. Marx, or by a Trust created by her; 291.666 shares by David A. Hamburger Corporation; and 291.666 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased. [R. 38.]

Its assets consisted of approximately \$160,000.00 of current assets; \$4,393,300.00 real estate, of which the property situated on Broadway, Eighth, and Hill Streets in Los Angeles, California, and leased to A. Hamburger & Sons, Inc., and May Co. represented \$4,000,000.00; and \$6900.00 of other assets. It had total liabilities of \$630,478.63. The parties stipulated the fair market value of all the assets and the liabilities on the basic date. [R. 374, 375, 381-382 [Ex. 1].] The net worth of the company was \$3,927,153.64 [R. 51], which, divided by the 1000 shares of stock outstanding, resulted in a net worth per share of \$3927.15. The Tax Court determined a fair market value of the Hamburger Realty Company stock was \$3900.00 per share and would have determined "a somewhat larger valuation" had the respondent not asked for a value of \$3900.00 per share. [R. 59-60.] Mr. Allen, a witness called by respondent, rounded out the asset value of \$3927.15 to \$3900.00, because personal assets sell in round figures. [R. 263, 274-275.]

The receipts, expenses, federal income taxes, and net income after taxes and dividends paid, were stipulated by

the parties and so found by The Tax Court for each year beginning 1936 through 1943. [R. 383-384, 41-43.] A comparison of the dividends paid and the net income after provisions for federal taxes shows that all such net income was paid out as dividends. The total net income available for dividends for said years was \$1,257,262.43 and total dividends paid for said years was \$1,325,104.51. The average earnings per share for said period was \$157.16. The average dividends paid per share for said period was \$165.64. For the year 1941 the corresponding figures were \$151.44 and \$149.61.

The principal source of income to Hamburger Realty Company was the rental income of \$250,000.00 a year from A. Hamburger & Sons, Inc., on the lease covering the property on Broadway, Eighth and Hill Streets. The company's total income from other sources ranged from \$22,540.06 to \$44,825.72 during the period 1936 to 1941. [R. 383-384.] However, on the basic date, it was known that the lease to A. Hamburger & Sons, Inc., would terminate on December 31, 1942 and the lease to the May Co., which had been executed in 1923, would come into force and thus the company's income from the Broadway, Eighth and Hill Street property would be increased to \$300,000.00 a year. [R. 50.] However, as was stated in relation to A. Hamburger & Sons, Inc., it was equally known that costs of operation and federal income taxes would increase and that only a relatively small amount of the additional \$50,000.00 of income would be available to the company. Actually, a comparison of the 1943 and

1941 profit and loss statements shows that while the company's gross income increased \$46,000.00 in 1943 over 1941, the net income after taxes was \$21,000.00 less in 1943 than in 1941, due to increases in expenses and in federal income taxes, which latter also increased \$46,000.00 in 1943 over 1941. [R. 42.] Consequently, a buyer in 1941 could not have reasonably expected the company's net income after taxes to have been greatly different than the previous five year average.

As shown above, representative securities were selling at about ten times earnings and yielding between six per cent and ten per cent.

Mr. Eitner testified that the fair market value of the Hamburger Realty Company stock would be eleven times earnings to yield nine per cent, and Mr. Walker testified a factor of ten times earnings and a yield of ten per cent would produce the fair market value of said stock. [R. 132-133, 176, 177.] This produced a fair market value of \$2000.00 and \$1750.00, respectively. Each increased the average earnings as of 1941 by the anticipated increase in earnings from the increased May Co. rental beginning in 1943. This estimate of the increase after taxes was \$30.00 per share, so that Mr. Eitner anticipated earnings and dividends to be \$180.00 per share and Mr. Walker anticipated earnings and dividends to be \$175.00 per share. [R. 131-132, 176.]

The facts relating to the condition of the stock market and world conditions stated above are of equal effect on the Hamburger Realty Company stock.

Specifications of Error.

The Tax Court of the United States erred as a matter of law:

1. In determining and deciding that the per share fair market value of the stocks in question was a sum equivalent to the value of its net assets divided by the number of its outstanding shares.

2. When determining the fair market value of the stocks in question, it disregarded factors of valuation required by law and by Respondent's regulations 105 (Sec. 81.10) to be considered, such as the company's earning power, dividend-paying capacity, marketability of the stocks, testimony of expert witnesses, status of management, present and future, comparison with other securities, the fact that the interest here to be valued is a minority interest, the trend of the market and economic conditions, income tax burdens and all other relevant factors, including the views of the buyer as well as the seller, as required by the definition of "fair market value."

3. In that there was no substantial evidence or evidence legally sufficient to sustain its finding of value for the stocks involved herein.

4. In determining and deciding the fair market value of the stocks here involved contrary to law and its findings of fact.

5. In denying petitioner's Motions for Rehearing, for Reconsideration, and for Review by the Full Court.

Summary of Argument.

Findings of value by The Tax Court must be based upon competent, relevant, and material evidence. The Tax Court decisions must be reversed if they are “not in accordance with law.” (Section 1141(c)(1), Internal Revenue Code.) The present decision is not in accordance with law, because The Tax Court erred as a matter of law in the following respects:

1. It determined the value of the stocks here involved solely on net worth.
2. It failed to consider and disregarded the various factors required by the adjudicated cases and by the Treasury Regulations to be considered, such as earnings, dividend-paying capacity, marketability, expert testimony, income tax burdens and expenses, management, comparisons with other securities, the fact that the interest here involved is a minority interest, and the trend of the market and economic conditions.

ARGUMENT.

I.

The Court Erred in Determining the Value of the Stocks Involved Solely on Net Worth.

There can be no question that the Court based its determination of the fair market value of the two stocks here involved solely on the fair market value of the respective corporation's net worth. The Court states:

“ . . . for existing purposes the fair market value of the assets is the only remaining available factor that can be intelligently used in arriving at this valuation.” [R. 58.]

The Court then cites *Estate of Henry E. Huntington, Deceased*, 36 B. T. A. 698 and *Bank of California v. Commissioner*, 133 F. (2d) 428 and quoted the holdings therein to the effect that the stocks therein involved were valued solely on the basis of the net worth of the corporations. [R. 58-59.] The Court then states,

“On the basis of the above precedents we would be inclined to find a somewhat larger valuation than is contended for by respondent.”

The Court then states it will approve the values of \$3-900.00 and \$1,000.00 per share of Hamburger Realty Company and A. Hamburger & Sons, Inc., respectively, as requested by Respondent. [R. 59.]

The net worth values for the two companies was \$3,-927.15 and \$1,029.29, respectively. Obviously, we submit, the “somewhat larger valuation” referred to by the

Court was the \$27.15 and \$29.29 to bring the values determined up to the net worth value.

This is the method used by Mr. Allen, a witness called by respondent. [R. 263, 269, 274-275, 285-286.]

This Court and many others have held that it is reversible error to consider net worth alone. In *Bank of California v. Commissioner, supra*, one of the cases relied on by The Tax Court, after quoting regulations identical with those involved here, this Court stated at page 430:

“Oakburn was a close corporation. Therefore, in determining the fair market value of Oakburn stock at the time of decedent’s death, *the Board was required to consider the factors mentioned in article 13—net worth, earning power, dividend-paying capacity, and all other relevant factors—in so far as the evidence disclosed them . . .*” (Emphasis added.)

This Court then examined the evidence and concluded that the evidence before the Board did not disclose the referred to factors and for this reason affirmed the Board.

In *Laird v. Commissioner*, 3 Cir., 85 F. (2d) 598, *Weber v. Rasquin*, 2 Cir., 101 F. (2d) 62, *Worcester County Trust Co. v. Commissioner*, 1 Cir., 134 F. (2d) 578, and *Commissioner v. McCann*, 2 Cir., 146 F. (2d) 385, the Circuit Courts reversed the Board of Tax Appeals for its failure to give effect to the same requirements of the regulations.

II.

The Court Erred in Disregarding Factors of Valuation Required by Court Decisions and Respondent's Regulations to be Considered.

The Opinion of The Tax Court opens with a statement that "Petitioners contend that the value of the stocks of these two corporations must be determined by taking into account the earnings of the corporation, the dividends paid, and payable, marketability of the stock, the net worth of the company, the condition of the management of the company, a comparison of these stocks with other similar securities, market trends, conditions and restrictions affecting said stocks, the position of minority interests in said corporations and other similar facts . . . They also take the position that the fair market value of the stocks in this case is controlled by the rule expounded by many decisions and set forth in Section 81.10 of Treasury Regulations 105:

"The fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell." [R. 54.]

The second paragraph of the Opinion immediately following the above quotation states:

"The respondent contends that when all of the peculiar facts in this case are considered, *all elements which would ordinarily be weighed in arriving at the value of the stock*, except the earnings of the corporation and the appraised value of their tangible assets, *are of little use.*" [R. 54.] (Emphasis added.)

The very next sentence of the Opinion is as follows:

“In *resolving these two positions*, certain basic facts impress us as controlling.” [R. 54-55.] (Emphasis added.)

The word “weigh” as used in the Court’s Opinion means “to consider or examine for the purpose of forming an opinion or coming to a conclusion”; “to consider as worthy of notice”; “to be considered as important”; “to judge, estimate, consider.”

Webster’s New International Dictionary—“Weigh.”

Thus, the Court states that it must determine whether it will adhere to petitioner’s contentions that all factors affecting value as “expounded in many decisions” and “Sections 81.10 of Treasury Regulation 105” must be considered or whether it will adhere to Respondent’s contention that only two of said factors—earnings and asset value—should be considered.

The Court then proceeds to do a most peculiar bit of resolving between the two contentions, by arriving at conclusions diametrically opposed to the evidence and to its findings of fact, for the sole purpose, not of considering the earnings, but to eliminate from Respondent’s contention the earnings factor and thus leaving only the asset value upon which to base the value of the stocks in question.

Never again, after reciting Petitioner’s contentions, does the Court refer to them; never again does it refer to the “willing buyer and willing seller”; never again does it refer to “the rule expounded by many decisions.” On the contrary, its only reference is to matters not sup-

ported by the evidence or its findings of fact (to which we will refer in detail later) to eliminate the earnings factor from consideration.

In resolving the conflict of the Petitioner's and Respondent's contentions in favor of Respondent, the Court committed reversible error, for the rule of valuation is that *all* the above referred to factors must be considered, and it is reversible error to pick out one or two only of said factors and base the value of property in question thereon.

In *Guggenheim v. Helvering* (2 Cir.), 117 F. (2d) 469 at 473 the Court, speaking through Learned Hand, Circuit Judge, said:

"These values were however only *two* of the factors which entered into the value of the decedent's interest in the 'Old Firm,' and it by no means followed that because they made up all the property of the partnership his interest should be appraised as though he had held outright his aliquot part of the shares and the accounts and could have immediately disposed of them."

And after referring to several other factors which the Board disregarded, the Court reversed the Board because "The Board made no allowance for these factors" (p. 474.)

Laird v. Commissioner, 3 Cir., 857 F. (2d) 598;

Weber v. Rasquin, 2 Cir., 101 F. (2d) 62;

Worcester County Trust Co. v. Commissioner, 1 Cir., 134 F. (2d) 578;

Commissioner v. McCann, 2 Cir., 146 F. (2d) 385.

1. *Earnings and Dividend-paying Capacity.* We shall attempt to demonstrate the truth of our statement above,

that the Court relied on erroneous and unsupported conclusions to eliminate earnings and dividend-paying capacity from consideration.

The Court states: "For many years past A. Hamburger & Sons, Inc., had been operating apparently on the basis of advancing the private economic welfare of its stockholders and officers rather than attempting to increase its own earning capacity." [R. 55.] The Court then refers to \$1,920,000.00 of two per cent notes [Exs. C-F, incl., R. 352-374], secured by mortgages or liens on stocks to stockholders and says "The repayment of the note is by installment payments and no interest at all is required, except on overdue installments." [R. 55.] The notes are all substantially in the same form and contain the same provisions. Referring to the notes [Exs. C-F, incl.] the following provision is found in each note: "All unpaid balances of said indebtedness shall bear interest at the rate of two per cent (2%) per annum, payable on March 10, 1939, and annually thereafter." [R. 352, Ex. C; 358, Ex. D; 363, Ex. E; 369, Ex. F.] There is no other reference to interest in any of said notes. The only direct testimony as to interest is that the notes were two per cent notes. [R. 93.]

The only explanation for the Court's erroneous conclusion is that the Court interrupted "unpaid balances" to mean "overdue installments," which, we submit, is a wholly unwarranted interpretation.

The Court then refers to \$384,000.00 of open accounts due from stockholders and because it erroneously concluded that no interest was charged on the notes, it concluded that none was charged on the open accounts. [R. 55-56.] It would seem that since the basis of the Court's

presumption is erroneous, its presumption is erroneous, and is contrary to the provisions of Section 1914 of the *Civil Code of California*, which provides that a loan of money is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing. In the absence of agreement interest is chargeable by law at the rate of seven per cent. *California Constitution*, Art. XX, Sec. 22, and *Douglas v. Klopfer*, 288 Pac. 36, 40.

The Court then states that there were ample bonds on the market in 1940 and 1941 *returning* 4 per cent interest and of extremely high security. [R. 56.] There is not one iota of evidence in the record upon which to base that statement. Not even the securities in A. Hamburger & Sons, Inc., portfolio, to which the Court refers. [R. 56.] The Court has no knowledge of the Los Angeles City High School District bonds, not even the maturity date, and hence it could not compute the interest return. And the United States Treasury bonds, Series 1947-52, would not yield 4 per cent to maturity on their then selling price. (Col. B.) [R. 43.]

These conclusions of the Court constitute the "basic facts" which impress the Court as controlling [R. 54-55], in resolving the contentions of Petitioner and Respondent and lead the Court to the additional conclusion that

"Under these circumstances it is obvious that little help can be received from considering the dividends paid record of *these corporations* for the reason that *their* dividend paying system was entirely abnormal. Thus, we have *two corporations* with no record of stock sales, a method of business operations unlike any normal corporation, and a system of paying divi-

dends to stockholders whereby the stockholders profited more from receiving the use of the assets of the corporations to their own individual profit than they would have profited by receiving normal dividends. Under such conditions we do not feel that any system of evaluating this stock which would apply to a normal corporation would be useful here.” [R. 56.] (Emphasis added.)

The statements that the “dividend paying system was entirely abnormal” “whereby the stockholders profited more from receiving the use of the assets of the corporation to their own individual profit than they would have profited by receiving normal dividends” are made in the face of the stipulated facts and the Court’s own findings showing that *every cent* of net income received by each corporation after payment of federal income tax was paid to the stockholders as dividends each year for the period 1936 to 1943, both inclusive. [R. 41-43; 48-50; 383-384; 390-391.] We submit that whatever abnormality existed in the dividend paying system would be favorable to the stockholders.

It is obvious, we believe, that it is the loans made by A. Hamburger & Sons, Inc., to its stockholders which caused the Court to conclude that the dividend paying policy was abnormal and profited the stockholders more than they would have profited by the payment of normal dividends. This conclusion indicates the superficiality with which the record in this case was examined. (As will be later pointed out, the Judge who decided the case did not try the case and had only the record to guide him.)

A reading of the Court’s opinion and the conclusions therein expressed would indicate that the directors and

stockholders were a happy, friendly family group and that the notes given by them were the result of a plan to milk the corporation and were recurrent—all of which is contrary to the evidence and the Court's findings of fact. The directors and stockholders were not friendly but were bitter enemies [R. 52, 80, 106-107]; each had a separate attorney to represent him in connection with the corporation affairs [R. 80-81; 91-92]; the notes were the result of legal disputes between the family members, including a will contest [R. 93], all of which occurred at and after the death of Mose Hamburger and was concluded in connection with the settlement of the will contest and corporate affairs in or about October, 1935 [R. 83, 93]; and from then on the notes have been a frozen transaction [R. 93] and, hence, not recurrent; the notes were a legal complication, not a business complication. [R. 93.]

It must follow, we submit, that the loans were not "a system of paying dividends to stockholders" and the dividend paying policy was not abnormal.

Even if we were to give credence to the Court's conclusions with respect to the notes due A. Hamburger & Sons, Inc., we fail to follow the logic which would make those "facts" applicable to Hamburger Realty Company. There were *no* loans to stockholders made by Hamburger Realty Company. [R. 39-41.] Yet the Court makes the foregoing conclusions applicable to "these corporations" and the "two corporations." [R. 56.]

As an additional reason for refusing to consider the earnings of Hamburger Realty Company, the Court refers to the method used by the parties hereto in arriving at the fair market value of its principal asset—namely, by capitalizing the rentals to be received thereon over the

terms of the May Co. Lease. [R. 58.] This, the Court states, is tantamount to the consideration of the income of the corporation in arriving at the value of the stock of Hamburger Realty Company.

The fallacy of this statement is, we believe, forcibly told in the following language of the Supreme Court of the United States in *Ray Consolidated Copper Company v. U. S.*, 268 U. S. 375 at 377:

“The capital stock of a corporation, its net assets, and its shares of stock, are *entirely* different things. The value of one bears no *fixed or necessary relation* to the value of the other.” (Emphasis added.)

In *Laird v. Commissioner of Internal Revenue*, 85 F. (2d) 598, the Circuit Court for the Third Circuit reversed the Board of Tax Appeals because it valued the assets (securities) of the closed corporations by taking the mean between the high and the low selling prices of the securities to determine the net worth of the two corporations there involved and dividing this by the number of outstanding shares.

See, also:

Laird v. Commissioner, 38 B. T. A. 926 at 942.

That the Court's reasoning is wholly devoid of logic can be demonstrated by a reference to the record. The lease rentals were at the rate of \$300,000.00 a year (\$25,000.00 a month). [R. 50.] The *net income* of Hamburger Realty Company after federal income taxes for the year 1941 was only \$151,436.75 [R. 42], approximately one-half of the rentals. The asset owned by the corporation was a 100 per cent interest; the stock here to be valued was approximately 10 per cent. Mr. Eitner makes

reference to this difference when questioned on cross-examination. [R. 139-142.]

The refusal to consider the earnings of Hamburger Realty Company in determining the fair market value of 10 per cent of its stock because of the value of an underlying asset and the method used to arrive at its value is, we submit, an error of law.

The Circuit Court of Appeals for the Second Circuit (by Judge August N. Hand) reversed the District Court because it erroneously eliminated earnings from consideration and relied wholly on net worth. The trial judge there, as in the instant case, had discussed and referred to the earnings and dividend-paying capacity of the corporation, and then discarded them and relied wholly on net worth. This the Circuit Court said was error.

Weber v. Rasquin, 101 F. (2d) (2nd Cir.) 61.

That the failure to use earnings and dividend-paying capacity in determining fair market value results in an arbitrary assessment is clearly expressed in *Great Northern Railway Company v. Weeks*, 297 U. S. 135 at 151:

“ . . . when the jurisdiction of the District Court is appropriately invoked, it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive. It clearly appears that the Board failed to give reasonable weight to the falling off of petitioner's traffic, gross earnings, operating income, . . . The value of petitioner's property varied with the *profitableness* of its use, present and prospective.” (Emphasis added.)

See, also:

Cleveland C. C. & St. Louis Railway v. Backus,
154 U. S. 439 at 445.

2. *Marketability*. The record shows clearly that this stock lacked marketability and liquidity. Mr. Allen, a witness called by the Respondent, testified that he had in mind the other stockholders as purchasers of this stock or an investment trust buying all the property. [R. 279-280, 301.] Mr. Eitner, who has had experience in dealing with stock of closed corporations [R. 122], testified the market would be very limited and Hamburger Realty Company stock here involved would probably have to be sold as a block to a fraternal organization or insurance company [R. 128-130] and that probably the stock of A. Hamburger & Sons, Inc., would have been parcelled in small share lots [R. 150] with consequent expenses of creating a market. Mr. Walker was of like opinion. [R. 177.]

That marketability or liquidity is an important factor in valuations is expressed in *International Harvester Co. v. Kentucky*, 234 U. S. 216 at 222, as follows:

“Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator.”

The value of any product, including corporate stock, is dependent on the law of supply and demand.

Commissioner of Internal Revenue v. Shattuck, 97
F. (2d) 790, 792;

Williams v. Commissioner, 44 F. (2d) 467.

Notwithstanding the evidence above mentioned and law referred to, The Tax Court refused to consider this factor. This, we submit, was error of law.

3. *Expert Testimony.* We do not contend that The Tax Court is bound to adopt the testimony of expert witnesses, but we do contend that it is not free to arbitrarily ignore such testimony, unless it has independent knowledge or there is other competent evidence in the record. We believe the rule to be as stated by this Court in reversing the Board of Tax Appeals in *Belveridge Oil Co. v. Commissioner* (9 Cir.), 85 F. (2d) 762, 768:

“It is contended that the Board is not required to follow the testimony of experts, but may disregard their evidence entirely. This statement is too broad. In *Boggs v. Buhl v. Commissioner* (C. C. A. 3), 34 F. (2d) 859, at page 861, the Court said: ‘While the Board may, as a general principle, reject expert testimony and reach a conclusion in accordance with its own knowledge, experience, and judgment, yet it must have knowledge of and experience with the particular subject under consideration. There is no evidence that the board had any independent and personal knowledge whatever of the business, reputation, and good will of the petitioner. Therefore, it could not set aside or disregard all the positive and affirmative evidence as to the value of the good will, and base its conclusion upon conjecture.’”

Other than referring to the fact that Petitioner introduced the testimony of two experts who gave their opinions as to the value of these stocks after being presented with hypothetical questions in which all of the factors of valuation were included [R. 54], The Tax Court never again refers to their testimony. Since the Court’s state-

ment is made in connection with its statement of Petitioner's contention (*supra*) and since the Court resolved the conflicting contentions in favor of Respondent and expressly refused to consider *all* the factors of value [R. 57-58], it is clear that the Court did not consider the testimony of the experts. Neither does it appear anywhere in the record that the Court had independent knowledge, experience, or judgment of the matters testified to by the experts.

Mr. Eitner and Mr. Walker were fully qualified and had made independent research and preparation of their testimony. [R. 120-123, 127, 167-172.]

They testified that the value of the stock here involved of Hamburger Realty Company was \$2000.00 and \$1750.00 per share, respectively, and that the value of the stock here involved of A. Hamburger & Sons, Inc., was \$337.50 and \$299.66 per share, respectively. [R. 128, 173, 148, 199.]

We submit that the Court's refusal to consider the expert testimony was arbitrary and constituted reversible error of law.

4. *Income Tax Burdens and Expenses.* Substantial increases in income taxes were regarded as inevitable on the basic date. The Excess Profits Tax Law of 1940 had been amended on March 7, 1941 and The Revenue Act of 1941 had been enacted September 20, 1941. (C. C. H., Vol. 3, par. 1866.03.) Since the Court eliminated earnings from consideration it follows that it did not consider income taxes and expenses which are a drain upon future earnings. This was error, for the Supreme Court in *Galveston Electric Co. v. Galveston*, 258 U. S. 388 at 399,

has held that taxes and expenses must be taken into account:

“ . . . In calculating whether the 5-cent fair will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and Federal taxes, or between income taxes and others . . . ”

Even if we assume that The Tax Court considered earnings in determining the values found, it should have made allowance against the asset value for expenses and income taxes upon liquidation. Not to have done so is error, as held in *Weber v. Rasquin*, 101 F. (2d) 62, at 64:

“The trial judge did nothing but compute the fractional interest of the decedent as a stockholder in the assets of the corporation without making any deduction for the expenses incidental to liquidation, if it should take place, or for the small earnings of the stock if it did not take place. This, we think, was error.”

In determining a value of \$3900.00 per share for Hamburger Realty Company, Mr. Allen, a witness called by Respondent, testified that he assumed a purchaser for all the assets of the corporation at the stipulated fair market values thereof. [R. 279.] The book value of those assets was \$1,947,164.18 and the fair market value thereof was \$4,557,623.27. [R. 41.] If we assume only a 10 per cent selling and liquidating expense, the cost would have reduced the net sales price to about \$4,100,000.00, which would mean in excess of \$2,000,000.00 profit. If we assume the lowest rate of tax would apply to this

profit, the tax would have been in excess of \$600,000.00. (Revenue Act of 1941, Sections 103 and 104.) Thus, the net asset value would be decreased by an amount in excess of \$1,000,000.00, or in excess of \$1,000.00 per share. Mr. Allen testified that the stockholders would receive the \$3,900.00 per share only if there were no charges against the sale. [R. 292-293.]

5. *Other Relevant Factors.* Other relevant factors which The Tax Court refused to consider were the condition of the management of the companies [R. 51-52, 128, 162, 71-76, 93-94, 106-109], comparison with other securities, the fact that the interest here to be valued is a minority interest in such corporation, and the trend of the market and economic conditions. [R. 176.]

Failure to consider these factors constitutes error of law.

William v. Commissioner, 44 F. (2d) 457;

Great Northern Railway Company v. Weeks, 297 U. S. 135;

Mathilde B. Cooper, 41 B. T. A. 114 at 129;

Helvering & Safe Deposit & Trust Co. of Baltimore, 95 F. (2d) 806.

“We think the Board was also in error in failing to consider the Company’s prospects for the future as a factor having a bearing on the value of its stock. That is to say, the Board, without explanation, made no mention of certain testimony offered by taxpayers on this subject and it disregarded its own findings to the effect that the sole salaried officer in charge of the Company, although capable, was ‘getting along in years,’ . . .

“In cases of this sort, where there have been no sales or bid and asked prices, these factors are relevant and should have been considered, not disregarded.”

Worcester County Tr. Co. v. Commissioner, 134 F. (2d) (1st Cir.) 578 at 582, in reversing the Board.

Conclusion.

The whole tenor of the opinion in the instant case is a reversal of the traditional attitude of The Tax Court and Board of Tax Appeals—an attitude of humility and willingness to decide difficult questions of fact upon competent evidence introduced before it. This attitude, which has brought the Court to a position of respect, is exemplified in the decision of the Board in the case of *James Couzens*, 11 B. T. A. 1040 at 1060, as follows:

“ . . . The Board and its members do not have, and are not expected to have, peculiarly expert knowledge upon the value of securities or any other of the multitudinous questions of fact which arise in the vast number of cases before it. It can only decide the issues in any case by giving judicial consideration to the evidence properly in the record. Such evidence is not to be regarded, as expressed by respondent's counsel, as an ‘assistance’ to the Board in discharging a duty imposed upon it, but as the proof and substantiation by the parties of the positions which they respectively present for adjudication . . . We approach the problem of value, therefore, not as experts with the aid of the parties, but to judge impartially of the issue between conflicting interests, in the light of all the evidence.”

As shown, *supra*, the Court's examination of the record was at most superficial, resulting in a series of erroneous conclusions—conclusions contrary to its findings of fact—which led it to the fatal error of refusing to consider any factor of valuation other than net worth.

The Court cites and relies on the case of *Melville Hanscom*, 24 B. T. A. 173, decided long prior to *Laird v. Commissioner*, 85 F. (2d) 598, which reversed the Board for an error of law identical with that made in the *Hanscom* case, and thus tacitly overruling the *Hanscom* case.

The reliance by the Court on the case of *Estate of Henry E. Huntington, Deceased*, 36 B. T. A. 698, was equally erroneous, as the case was tried on the theory that the net worth of the company was the fair market value of the stock. The only question was in relation to discounts in arriving at the net value of the assets. (See pp. 714, 721.)

We have previously shown that this Court's affirmance of the Board in *Bank of California v. Commissioner*, 133 F. (2d) 428 was due only to a failure of proof. This Court cited the regulations and held the Board was required to consider all the factors. (p. 430.)

We believe that the Commission of the errors herein shown to have been made was due in part, at least, to the unfortunate circumstance that this case was decided by a Judge who did not hear the evidence or see the witnesses; by one, in fact, who was not a Judge when the trial was held. This case was tried on October 4th and 5th, 1945 before the Honorable Arthur J. Mellott, an experienced Judge of The Tax Court. On December 8, 1945, Judge Mellott resigned as a Judge of The Tax

Court. Mr. Byron B. Harlan was thereafter appointed and on July 17, 1946 promulgated his Memorandum Findings of Fact and Opinion herein. It appears that Judge Harlan had neither judicial nor tax experience prior to his assuming his duties as a Judge of The Tax Court. (46 C. C. H. Index (Personnel), 18,003-18,004; 46 Prentice-Hall, Vol. 5, par. 70,401, p. 70,165; The Tax Magazine, April, 1946, pp. 393-394.)

Judge Harlan's opinion begins, as we have shown, with the unique doctrine that he must choose between Petitioner's contention that all factors affecting value must be considered and that the definition of fair market value as "expounded by many decisions" and set forth in Respondent's Regulations 105, Sec. 81.10 is controlling and Respondent's contentions that only net worth and earnings must be considered. After making a series of erroneous conclusions contrary to the uncontradicted evidence and stipulated facts and contrary to his own findings of fact, Judge Harlan chooses Respondent's contention that only net worth need be considered. Judge Harlan concludes his opinion with a statement only a little less pointed than that which he announced in the cases of *Victoria L. Cotton*, *Virginia Caldwell* (1946 Prentice-Hall Tax Court Memorandum Decisions, Par. 46,171, pp. 46-587) only five days after his decision in the instant case to the effect that he "would be very much inclined . . . to accept the Commissioner's finding as our own" were it not for the fact that the Commissioner had abandoned his determination. The Commissioner likewise abandoned his

determination in the instant case and Judge Harlan states [R. 59]: “. . . we would be inclined to find a somewhat larger valuation than is contended for by respondent. However, since the respondent asks for a valuation of \$3,900.00 a share for the stock of A. Hamburger & Sons, Inc., and for a value of \$1,000.00 a share for Hamburger Realty Company, we will approve that valuation.” (See Order [R. 59-60], amending this sentence to apply the \$3,900.00 value to Hamburger Realty Company, and the \$1,000.00 value to A. Hamburger & Sons, Inc.) We believe that this is a clear statement of abdication of the Court’s judicial functions in favor of the Commissioner’s whim. That this is erroneous and contrary to law is aptly stated by Justice Learned Hand speaking for Second Circuit in *Guggenheim v. Helvering*, 117 F. (2d) 469 at 474:

“ . . . In appraising property of this kind, whatever courts may say, and however they may seek to disguise what they do, it is impossible to avoid some measure of speculation . . . A judicial duty which is inherently subject to such shortcomings must not stop half way . . . And of all possible appraisals that alone was sure to be wrong which the Board chose; a doctrine so enamored of accuracy that it must abdicate is the most irrational of all. The law is not so helpless; situations again and again present themselves where, after all shifts are exhausted, rather than permit certain injustice, a tribunal will make the best reckoning that the facts admit though fully conscious of its infirmities . . . ”

We have not discussed the evidence presented to the Court below tending to establish much lower values than those found by the Court. Rather, we have endeavored to show that the Court committed errors of law and that there was no competent nor relative evidence that could conceivably support the values found by the Court and that the conclusions upon which such values were predicated were erroneous and contrary to its findings of fact and the evidence—in short, that the values found were arbitrary and excessive and that by reason thereof The Tax Court must be reversed.

Helvering v. Taylor, 293 U. S. 507, 555 at 287,
79 L. Ed. 623;

Powers v. Commissioner of Internal Revenue, 312
U. S. 259, 61 S. Ct. 509, 85 L. Ed. 817;

Laird v. Commissioner, *supra*;

Commissioner v. McCann, *supra*.

In an effort to have The Tax Court remedy its own errors, Petitioner filed a Motion for a Rehearing (in order that the Judge who was to decide the issues might observe the demeanor of the witnesses and personally hear the evidence) and, in the alternative, Motions for Reconsideration and for Review by the Full Tax Court. These motions were summarily denied. In view of the circumstances, Petitioner believes that the denials were an abuse of the Court's discretion.

This petition for review was filed because of the conviction that the Court committed reversible error of law,

that its conclusions of law and decision were contrary to and not supported by its Findings of Fact, that there was no substantial evidence or evidence legally sufficient to sustain its decision, that the Treasury regulations had been disregarded, that erroneous legal principles had been applied, that its findings of value were arbitrary and excessive, and that its decision was not in accordance with and contrary to law. It is respectfully submitted that the decision should therefore be reversed and the case remanded to The Tax Court with instructions to afford the parties an opportunity for further hearing.

Respectfully submitted,

CLAUDE I. PARKER,

RALPH W. SMITH,

J. EVERETT BLUM,

L. A. LUCE,

Counsel for Petitioner.

No. 11625

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

ESTATE OF BELLE ALICE HAMBURGER NATHAN, EVELYN
HAMBURGER, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

HELEN R. CARLOSS,
ROBERT N. ANDERSON,
MARYHELEN WIGLE,
Special Assistants to the Attorney General.

FILED

OCT 15 1947

PAUL P. O'BRIEN,

CLERK

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*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The unreported memorandum opinion of the Tax Court appears at pp. 54-60 of the Record.

JURISDICTION

This petition for review (R. 477-491) involves federal estate tax in the amount of \$47,543.61 (R. 68). Notice of deficiency was mailed the petitioner by the Commissioner of Internal Revenue on December 27, 1943 (R. 10-11); and within ninety days thereafter, on February 9, 1944, petitioner filed a petition with the Tax Court for a redetermination of that deficiency un-

der the provisions of Section 272 of the Internal Revenue Code (R. 5-17). The decision of the Tax Court (R. 67-68) was entered December 31, 1946 (R. 68). The case is brought to this Court by a petition for review filed March 25, 1947 (R. 491), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the Tax Court erred in determining that for estate tax purposes the stock of A. Hamburger & Sons, Inc., had a value of \$1,000 per share, and that of Hamburger Realty Company, \$3,900 per share.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*.

STATEMENT

The facts, taken from the Tax Court's memorandum findings (R. 36-53) are as follows:

Belle Alice Hamburger Nathan died on October 13, 1940. (R. 36.)

Her executors elected to have the assets of her estate valued on the optional date of October 13, 1941. (R. 36.)

The petitioners¹ filed a federal estate tax return on Form 706 with the Collector of Internal Revenue, Sixth District of California, and paid the tax provided therein. (R. 36.)

¹ Under motion (R. 492-495) the title of this action was amended so that there remains but one petitioner, Evelyn Hamburger, in the case.

Among the assets owned by the decedent at her death were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., and 104.167 shares of the common stock of Hamburger Realty Company. (R. 37.)

The petitioners returned the value of decedents shares in A. Hamburger & Sons, Inc., at \$983.35 per share. The respondent, in his notice of deficiency, valued the shares at \$1,200 per share. The petitioners returned the value of the shares of the Hamburger Realty Company at \$2,113.55 per share. The respondent, in his deficiency notice, valued the shares at \$4,850 per share. At the oral hearing the respondent announced that the testimony would not sustain the valuations set forth in the deficiency notice but would sustain a valuation of \$4,000 per share for the Hamburger Realty Company stock. However, in his brief below the respondent contended for a valuation of \$3,900 per share for the Hamburger Realty Company stock and \$1,000 per share for the A. Hamburger & Sons, Inc., stock. (R. 37.)

Petitioners filed an amended petition in which they claimed the Hamburger Realty Company stock was worth \$1,300 per share and the A. Hamburger & Sons, Inc., stock was worth but \$300 per share and, on this amended valuation, asked for a judgment for overpayment of taxes. (R. 37.)

A. Hamburger & Sons, Inc., a California corporation, had issued and outstanding 3,774.183 shares of common stock of a par value of \$1,000 each. (R. 37.)

The Hamburger Realty Company, a California cor-

poration, had issued and outstanding 1,000 shares of common stock of \$1,000 par value. Neither of these companies had any stock of any other character than the common stock referred to nor had they issued any bonds. (R. 38.)

The stock of the Hamburger Realty Company on the basic date was owned as follows (R. 38):

104.167 shares by petitioners herein;

104.167 shares by Evelyn Hamburger;

104.167 shares by Jennie H. Marx, or by a trust created by her;

291.666 shares by David A. Hamburger Corporation;

291.666 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased;

104.167 shares by A. Hamburger & Sons, Inc.

The stock of A. Hamburger & Sons, Inc., on the basic date was owned as follows (R. 38):

425.817 shares by petitioners herein;

425.817 shares by Evelyn Hamburger;

425.817 shares by Jennie H. Marx, or by a Trust created by her;

1,248.366 shares by David A. Hamburger Corporation;

1,248.366 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased.

All of the parties named in the two paragraphs immediately preceding this paragraph are brothers and sisters. (R. 39.)

No shares of stock of Hamburger Realty Company or of A. Hamburger & Sons, Inc., have ever been sold and each of the corporations is a closed family corporation. (R. 39.)

On the basic date the president, general and executive manager of the corporations was David A. Hamburger, aged 84 years. The vice-president of the corporations on the basic date was Evelyn Hamburger, aged 72 years. The secretary-treasurer of the corporations was P. L. Nathan, aged 76 years. Jennie H. Marx was 81 years of age on the basic date. (R. 39.)

The assets, liabilities and net worth of the Hamburger Realty Company on the basic date and the book value (Column A) and the fair market value (Column B) thereof are as follows (R. 39-41):

	Column A Book value	Column B Fair Market value
ASSETS		
A. Cash on hand \$10,720.74 and Accounts Receivable \$145.96.....	\$10,866.70	\$10,866.70
B. Stocks:		
1. 275 shares Farmers & Merchants National Bank of Los Angeles, Calif.....	71,234.00	106,700.00
2. 678 shares Security-First National Bank of Los Angeles, California.....	31,477.50	32,967.75
3. 140 units Security Company.....	None	4,340.00
4. 10 shares Wells Fargo Bank & Trust Company.....	1,885.00	2,925.00
5. 500 shares Angeles Hospital Association.....	350.00	350.00
6. 13 shares Retail Merchants Credit Association.....	1,285.00	1,285.00
C. Real Estate:		
1. W. 8th, Broadway & Hill Sts., property under lease to A. Hamburger & Sons, Inc., and May Company.....	1,185,421.44	4,000,000.00
2. No. 845 South Broadway property.....	101,107.46	315,600.00
3. 36/144 interest S. W. Cor. 15th & Hill.....	19,164.78	3,600.00
4. 2/10th interest N. E. Cor. 14th Place & Hill.....	13,205.88	2,000.00
5. 6/30th interest S. E. Cor. 14th & Hill Sts.....	6,880.38	1,400.00
6. 1/2 interest N. E. Cor. 15th & Hill Sts.....	51,433.30	6,000.00
7. Vallejo, Solano County property.....	None	None
8. 1404 South Hill St.....	26,692.26	5,000.00
9. 149 W. 14th Place.....	39,937.31	6,000.00
10. 1318/22 South Hill St.....	74,111.35	5,800.00

	Column A Book value	Column B Fair Market value
C. Real Estate—Continued		
11. S. W. Cor. 15th & Hill Sts.....	\$60,398.50	\$6,000.00
12. Temple Street property.....	10,589.35	3,500.00
13. 14th Place & S. Broadway.....	26,622.61	3,500.00
14. S. E. Cor. 10th & Main Streets.....	200,006.40	30,000.00
15. S. E. Cor. Ezra St. & Pico Blvd.....	2,468.82	500.00
16. W. 15th btn. Hill & Olive Sts.....	5,228.32	3,000.00
D. Office Furniture & Fixtures.....	None	100.00
E. Prepaid taxes and insurance.....	6,547.82	6,547.80
F. Sales Contract—Leroy Joseph.....	250.00	250.00
Total Assets.....	1,947,164.18	4,557,632.27
LIABILITIES		
A. Accounts Payable.....	6,391.90	6,391.90
B. Federal income and excess profits taxes.....	70,116.03	70,116.03
C. Note due A. Hamburger & Sons, Inc.....	548,220.70	548,220.70
D. Lease rental deposits from lessees.....	5,750.00	5,750.00
Total Liabilities.....	630,478.63	630,478.63
Net Worth.....	1,316,685.45	3,927,153.64

The profit and loss statements of Hamburger Realty Company for the years beginning 1936 to and including the year 1943 are as follows (R. 41-42) :

Year			
1936	Receipts.....	\$282,839.06	
	Expenses.....	85,805.39	
		197,033.67	
	Federal Income Tax.....	27,936.41	
			\$169,097.26
1937	Receipts.....	285,569.43	
	Expenses.....	80,345.72	
		205,223.71	
	Federal Income Tax.....	28,709.47	
			176,514.24
1938	Receipts.....	291,041.44	
	Expenses.....	82,874.28	
		208,167.16	
	Federal Income Tax.....	33,629.85	
			174,537.31
1939	Receipts.....	293,643.30	
	Expenses.....	80,615.30	
		213,028.00	
	Federal Income Tax.....	34,694.30	
			178,333.70

Year			
1940	Receipts.....	\$272, 540. 06	
	Expenses.....	77, 613. 33	
		<hr/>	
		194, 926. 73	
	Federal Income Tax.....	45, 319. 37	
		<hr/>	\$149, 607. 36
1941	Receipts.....	294, 825. 72	
	Expenses.....	73, 272. 94	
		<hr/>	
		221, 552. 78	
	Federal Income Tax.....	70, 116. 03	
		<hr/>	151, 436. 75
1942	Receipts.....	293, 138. 32	
	Expenses.....	73, 447. 84	
		<hr/>	
		219, 690. 48	
	Federal Income Tax.....	92, 035. 28	
		<hr/>	127, 655. 20
1943	Receipts.....	340, 321. 88	
	Expenses.....	93, 711. 28	
		<hr/>	
		246, 610. 60	
	Federal Income Tax.....	116, 529. 99	
		<hr/>	130, 080. 61

Dividends paid by Hamburger Realty Company for years beginning 1936 to and including the year 1943 are as follows (R. 42-43):

Year		
1936—January 6.....		\$183, 082. 14
1937—January 7.....		171, 769. 75
1938—January 7.....		176, 514. 24
February 17.....		1, 091. 32
1939—February 7.....		174, 537. 31
December 13.....		9, 571. 18
1940—February 8.....		176, 260. 91
March 7.....		2, 072. 79
1941—January 15.....		149, 607. 36
1942—March 12.....		151, 436. 75
1943—March 15.....		129, 160. 76

The assets, liabilities, and net worth of the A. Hamburger & Sons, Inc., on the basic date and the book

value (Column A) and the fair market value (Column B) thereof are as follows (R. 43-47):

	Column A Book Value	Column B Fair Market Value
ASSETS		
A. Cash on hand and in banks.....	\$113,706.56	\$113,706.56
B. U. S. Treasury Bonds & Certificates:		
1. \$141,500 P. V. Series 1945-7 2¾%.....	139,139.06	152,245.15
Interest.....	1,134.95	302.67
2. \$100 P. V. Series 1955-60 2⅞%.....	98.50	111.41
Interest.....	.84	.22
3. \$122,000 P. V. Series 1955-60 2⅞%.....	120,633.84	135,915.63
Interest.....	730.73	272.79
4. \$126,150 P. V. Series 1943-45 3¼%.....	124,272.81	133,324.78
Interest.....	854.15	2,027.10
5. \$84,100 P. V. Series 1944-46 3¼%.....	82,841.87	89,776.75
Interest.....	569.43	1,351.40
6. \$100 P. V. Series 1944-46 3¼%.....	100.00	106.75
Interest.....	.68	1.61
7. \$150,000 P. V. Series 1947-52 4¼%.....	168,187.50	177,000.00
Interest.....	1,436.54	3,152.10
C. Notes Receivable of S. W. Levenson.....	1,500.00	1,500.00
Interest.....	11.25	None
D. Mortgages & Trust Deeds:		
1. Estate of Bella A. H. Nathan.....	55,797.61	55,797.61
Interest.....	None	None
2. Armenian Gethsemane Church.....	3,000.00	3,000.00
Interest.....	52.50	20.00
E. Bonds:		
1. \$100,000 P. V. L. A. City High School District 4¾% 3/1 and 9/1.....	103,815.22	103,815.22
Interest.....	1,583.33	554.10
2. \$3,100 P. V. Calif. Country Club 7% 5/1 and 11/1.....	3,050.00	3,050.00
Interest.....	None	None
F. Stocks:		
1. 20 shares American Tel. & Tel.....	2,105.00	3,057.50
2. 1,167 shares Texas Corporation.....	35,933.88	47,409.38
3. 1,505 shares Union Oil Co. of Calif.....	25,812.50	22,575.00
4. 400 shares Inglewood Park Cemetery.....	16,000.00	30,000.00
5. 1,000 shares Standard Oil Co. of Calif.....	41,375.00	23,000.00
G. Real Estate:		
1. 955 S. Alvarado, Acacia Arms.....	44,798.22	30,000.00
2. 421 East 7th Street, Stadler Hotel.....	81,520.78	65,000.00
3. 5320 Olympic Blvd., Meadowbrook Apts.....	55,345.66	25,000.00
4. 3123-9 Sunset Blvd., Westerly Terrace.....	33,175.20	17,500.00
5. 420 N. Coronado Street.....	20,644.63	15,000.00
6. 440 N. Coronado Street.....	20,111.59	15,000.00
7. 2311 Nottingham Street.....	23,959.68	16,500.00
8. 1034-40 W. Temple Street.....	15,695.49	13,500.00
9. N. E. Cor. Santa Monica & Serrano.....	51,636.53	25,000.00
10. 21 Avenue 26, Venice, California.....	3,703.76	2,500.00
11. 4500/10 Santa Monica Blvd.....	30,005.61	15,000.00
12. 901 Exposition Blvd.....	30,902.37	27,500.00
13. 932 S. Mariposa Street.....	20,313.74	15,000.00
14. 2418/22 Brooklyn Street.....	20,655.87	18,750.00
15. S. E. Cor. 90th & Broadway.....	10,502.04	9,500.00

	Column A Book value	Column B Fair Market value
G. Real Estate—Continued		
16. Cor. Jefferson & Grand, Warehouse.....	\$179,675.79	\$300,000.00
17. 2165/9 West Washington St.....	25,461.25	15,000.00
18. 423 S. Western Avenue.....	53,254.60	18,000.00
19. 5425 Santa Monica Blvd. Flomar Apts.....	63,261.33	50,000.00
20. 1627 Ingraham St.....	32,639.24	25,000.00
21. 3800 S. Vermont Avenue.....	52,443.06	43,500.00
22. 1245 W. 49th Street.....	3,891.05	2,750.00
23. S. E. Cor. Clinton & Madison Streets.....	19,559.78	5,000.00
24. Lot 12 and part Lot 5, Sec. 18 Twp. 2, R. 2, W., Riverside County (8,059/10,000ths Interest).....	1,227.29	500.00
25. 8/30th interest 1402 S. Hill Street.....	15,099.43	1,850.00
26. 2/10th interest N. E. Cor. 14th Place and Hill St.....	11,113.71	2,000.00
27. 5/144th interest S. W. Cor. 15th and Hill Sts.....	3,022.72	425.00
28. 1/2 interest N. E. Cor. 15th & Hills Sts.....	48,318.71	6,000.00
29. 1235 S. Hill Street.....	47,933.87	6,400.00
H. 104.167 shares Hamburger Realty Co.....	382,525.73	406,251.30
I. Due from affiliated corporations:		
1. David A. Hamburger Corporation at 2% (1/1/38).....	560,000.00	420,000.00
Interest.....	6,096.49	1,026.76
2. David A. Hamburger Corporation at 2% (12/13/39).....	12,000.00	12,000.00
Interest.....	259.00	80.00
3. Hamburger Realty Co. 2% (12/31/40).....	548,220.70	548,220.70
Interest.....	None	None
4. David A. Hamburger Corporation—open account.....	161,299.29	161,299.29
J. Due from Officers and Stockholders:		
1. Evelyn Hamburger \$74,052.60 & \$3,988.64.....	102,725.44	78,041.24
2. Estate of Belle A. H. Nathan \$49,520.89 and \$11,209.29.....	77,237.14	60,730.18
3. Jennie H. Marx—\$113,174.55.....	150,899.40	113,174.55
4. Estate of M. A. Hamburger—\$409,186.14.....	409,186.14	409,186.14
Interest.....	1,977.70	2,341.36
K. Open Accounts—Stockholders:		
1. Evelyn Hamburger.....	94,972.06	94,972.06
2. Jennie H. Marx.....	94,502.53	94,502.53
3. Estate of M. A. Hamburger.....	87,504.20	87,504.20
4. Estate of Belle A. H. Nathan.....	45,560.83	45,560.83
L. Prepaid taxes, prepaid insurance and prepaid rent commissions.....	11,744.01	11,744.01
Total Assets.....	4,810,357.31	4,436,883.88
LIABILITIES		
A. Current Liabilities.....	444,244.98	444,244.98
B. Federal Income and Excess Profits Taxes.....	96,489.07	96,489.07
C. Lease rental deposits from lessees.....	14,382.50	14,382.50
Total Liabilities.....	555,116.55	555,116.55
Net Worth.....	4,255,240.76	3,881,767.33

Under the terms of the lease between A. Hamburger & Sons, Inc., and The May Department Stores Company dated March 30, 1923, A. Hamburger & Sons, Inc., was entitled to receive, during the period commencing November 1, 1941, and ended December

31, 1942, the sum of \$604,078.16 and during this same period A. Hamburger & Sons, Inc., was obligated to pay to the Hamburger Realty Company as rental for the same property the sum of \$291,666.66. The excess of the amount that A. Hamburger & Sons, Inc., was entitled to received from The May Department Stores Company over and above the amount A. Hamburger & Sons was required to pay to the Hamburger Realty Company during the period commencing November 1, 1941, and ended December 31, 1942, was \$312,411.49 which, when discounted at six percent (.9433) to the date of receipt, had a value at October 13, 1941, of \$294,697.77, and, when discounted at seven percent to the date of receipt had a value at October 13, 1941, of \$279,218.75. This sum is not, nor is any portion thereof, carried as an asset, and is not reflected in the above balance sheet. (R. 47-48.)

The profit and loss statements of A. Hamburger & Sons, Inc., for the year beginning 1936 to and including the year 1943 are as follows (R. 48-49):

Year			
1936	Receipts.....	\$397, 685. 74	
	Expenses.....	59, 928. 64	
		<hr/>	
		337, 757. 10	
	Federal Income Tax.....	41, 360. 14	
		<hr/>	\$296, 396. 96
1937	Receipts.....	445, 422. 81	
	Expenses.....	66, 986. 65	
		<hr/>	
		378, 436. 16	
	Federal Income Tax.....	44, 051. 15	
		<hr/>	334, 385. 01
1938	Receipts.....	416, 682. 57	
	Expenses.....	60, 718. 16	
		<hr/>	
		355, 964. 41	
	Federal Income Tax.....	50, 694. 87	
		<hr/>	305, 269. 54

Year			
1939	Receipts.....	\$416, 551. 04	
	Expenses.....	62, 180. 38	
		<hr/>	
		354, 370. 66	
	Federal Income Tax.....	50, 511. 86	
		<hr/>	\$303, 858. 80
1940	Receipts.....	406, 941. 05	
	Expenses.....	60, 936. 33	
		<hr/>	
		346, 004. 72	
	Federal Income Tax.....	71, 493. 34	
		<hr/>	274, 511. 38
1941	Receipts.....	410, 128. 89	
	Expenses.....	62, 116. 66	
		<hr/>	
		348, 012. 23	
	Federal Income Tax.....	96, 489. 07	
		<hr/>	251, 523. 16
1942	Receipts.....	417, 465. 74	
	Expenses.....	60, 998. 51	
		<hr/>	
		356, 467. 23	
	Federal Income Tax.....	135, 911. 53	
		<hr/>	220, 555. 70
1943	Receipts.....	154, 476. 52	
	Expenses.....	53, 730. 81	
		<hr/>	
		100, 745. 71	
	Federal Income Tax.....	26, 108. 48	
		<hr/>	74, 637. 23

Dividends paid by A. Hamburger & Sons, Inc., for years beginning 1936 to and including the year 1943 are as follows (R. 49-50) :

1936—March 24.....	\$295, 912. 43
1937—January 7.....	262, 478. 08
January 27.....	50, 734. 00
December 29.....	6, 350. 00
1938—January 7.....	276, 997. 91
February 17.....	41, 615. 44
1939—February 7.....	305, 269. 54
1940—February 8.....	300, 579. 11
March 7.....	3, 946. 97
1941—January 15.....	274, 511. 38
1942—March 12.....	251, 523. 16
1943—March 15.....	222, 687. 57

On the 30th day of March, 1923, there was in existence a lease from the Hamburger Realty Company to A. Hamburger & Sons, Inc., for the property situated at Broadway, Eighth, and Hill Streets, Los Angeles, California, which lease terminated on December 31, 1942, and which lease provided for an annual rental of \$250,000 payable by A. Hamburger & Sons, Inc., to Hamburger Realty Company. (R. 50.)

On the 30th day of March, 1923, A. Hamburger & Sons, Inc., subleased the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, to The May Department Stores Company for a term of twenty years, terminating December 31, 1942, for a total rental of \$10,355,625.60 payable \$43,148.44 per month. (R. 50.)

On the 30th day of March, 1923, Hamburger Realty Company leased the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, to The May Department Stores Company for a term of thirty years commencing January 1, 1943, and terminating December 31, 1972, for a total rental of \$9,000,000, payable \$25,000 per month beginning January 1, 1943. (R. 50.)

The May Department Stores Company is a reputable department store organization in good standing and a purchaser or owner of the shares of stock here in issue would not have been unduly alarmed as to the receipt of the rentals provided for. (R. 50-51.)

The leases referred to in the findings did not provide for the lessee carrying full coverage insurance against such hazards as fire, lightning, explosion,

flood and water, earthquake, and other like hazards, for the protection of the lessors, and the cost of such full coverage insurance would have been \$10,487.38 for the first forty-five years of the leases and \$20,395.78 for the last five years of the leases. (R. 51.)

For several years prior to the basic date David A. Hamburger, president, general and executive manager of Hamburger Realty Company and A. Hamburger & Sons, Inc., had been ill and almost continuously confined to his bed. (R. 51.)

On or about the basic date and for some time prior thereto P. L. Nathan, secretary-treasurer of Hamburger Realty Company and A. Hamburger & Sons, Inc., was and had been in poor physical condition and showing signs of senility. (R. 51.)

Neither Evelyn Hamburger nor Jennie H. Marx prior to the basic date had any business experience. (R. 51.)

The children of David A. Hamburger are Catherine F. Hamburger, Florence H. Becker, Arthur Hamburger, and Howard Hamburger. None of the children of David A. Hamburger has had any experience in business and, except possibly for one of the daughters, had never held any position in either Hamburger Realty Company or A. Hamburger & Sons, Inc. (R. 51.)

The management on the basic date had not trained or attempted to train any younger people to take over the management or operation of either Hamburger Realty Company or A. Hamburger & Sons, Inc. (R. 52.)

For many years prior to and subsequent to the

basic date there were sever inharmonious relations existing between the stockholders and directors of Hamburger Realty Company and A. Hamburger & Sons, Inc.; David A. Hamburger did not speak to P. L. Nathan or Evelyn Hamburger or Jennie Marx and the latter three did not speak to David A. Hamburger; each of these persons had his or her own separate attorney advising him or her in connection with the affairs of the corporations. (R. 52.)

The inharmonious relations referred to seriously affected adversely the formation of any business or financial or investment policy of either corporation, to the end that such policies remained in status quo and stagnated. (R. 52.)

The shares of stock of each of the corporations on the basic date were not attractive to banks as security for a loan. (R. 52.)

The stockholders regularly each year, pursuant to an agreement, anticipated the earnings of the A. Hamburger & Sons, Inc., for the year and borrowed all of the earnings during such current year, leaving no earnings in the business for corporate operations. (R. 52.)

The stockholder members of the Hamburger family, by reason of being stockholders, had other advantages, such as borrowing money at a low rate of interest and from sources through the corporation, whereas, they could not have borrowed it from other sources on the same collateral. This advantage would not necessarily have been available to the purchaser of the

minority interests in the corporations here involved. (R. 52-53.)

The fair market value of the property located at Broadway, Eighth and Hill Streets, Los Angeles, California, and subject to the leases from Hamburger Realty Company to The May Department Stores Company was arrived at by giving effect to the lease and the lease rentals discounted on a seven percent basis and adding the residual value of the property. (R. 53.)

On the basic date 131 shares of the common stock of A. Hamburger & Sons, Inc., owned by decedent herein at the time of her death, were pledged to the corporation to secure an indebtedness of \$85,817.14 owing by the decedent to the corporation and evidenced by two promissory notes, one in the amount of \$66,027.85 and one in the amount of \$19,789.29, the notes bearing date of January 1, 1938, and being renewal notes of earlier dated notes. (R. 53.)

The fair market value of the 104.167 shares of common stock of the Hamburger Realty Company on October 13, 1941, was \$3,900 per share. The fair market value of the 425.817 shares of the common stock of A. Hamburger & Sons, Inc., on October 13, 1941, was \$1,000 per share. (R. 53.)

SUMMARY OF ARGUMENT

The Tax Court did not err here in determining that the value of the Hamburger Realty Company stock was \$3,900 per share on the critical date, and that of A. Hamburger & Sons, Inc., \$1,000. The problem is

really one of weighing the evidence, and that of course is not the function of a court of review.

There is no merit to petitioner's contention that the Tax Court contravened the controlling Regulations which prescribe the factors to be considered in evaluating stock, by "ignoring" certain of them which petitioner herself thinks highly important. Those factors were not passed over; the Tax Court's opinion clearly shows that they were not. All that happened here was that the court below considered that the criteria stressed by petitioner's expert witnesses were of less value as guide-posts in the particular circumstances of this case, than were those on which the Government's expert witness based the evaluation which the Tax Court adopted.

ARGUMENT

The Tax Court correctly evaluated the two stocks here in question

This Court has many times declared that the value of property for tax purposes presents peculiarly a question of fact, and that the findings of the Tax Court on the subject will not be disturbed if there is support for them in the record. *Zanuck v. Commissioner*, 149 F. 2d 714; *Kinney's Estate v. Commissioner*, 80 F. 2d 568; *Old Mission Cement Co. v. Commissioner*, 69 F. 2d 676, affirmed on another point, 293 U. S. 289. See also *Roth v. Wardell*, 77 F. 2d 124. We think there is ample such substantiation for the decision below; indeed we submit that petitioner's complaint, although in terms charging the Tax Court with having failed to "consider" (Br. 15) certain

evaluation factors which petitioner urged upon it, is in reality nothing more than a condemnation of the Tax Court, for having failed to *accept* those criteria as being in this instance determinative, and to reach conclusions favorable to petitioner accordingly. In effect, petitioner is now importuning this Court to reweigh the evidence; and that, of course, is not the function of judicial review. *Webre Steib Co. v. Commissioner*, 324 U. S. 164; *Commissioner v. Scottish American Co.*, 323 U. S. 119; *Zanuck v. Commissioner*, *supra*.

We agree with petitioner that the case is governed by Section 81.10 of Treasury Regulations 105 (Appendix, *infra*), which section in pertinent substance provides that in the case of nonlisted stocks on which no bid and asked prices are available, value is to be determined on the basis of the corporation's net worth, earning power, dividend-paying capacity, and other relevant factors. We agree, too, that all of these factors are to be "considered"; but that does not mean, we submit, that the evaluator may not exercise his judgment in deciding among comparative "relevancies", or that he may not select as finally determinative such of these criteria as seems to him best to fit the particular case. Assuredly, no other rule would be workable. For example, we think it borders on the obvious that in ascertaining the value of stock in a corporation which unlike the one at bar, as we shall see, is strictly a personal service company, "net worth" would be rationally of scant aid whereas "earning power" would there logically assume com-

elling significance. Yet the petitioner at bar, in her apparent insistence upon equal force being accorded to all factors named in the Regulations, must inevitably take the position that, in the hypothetical case just stated, earning power should weigh no more heavily than should net worth.

We certainly find no decisional authority for a proposition of that kind. Indeed, good authority can be found which, in the given case, placed main emphasis on almost every one of the various factors which the Regulations state are to be taken into consideration in reaching a conclusion as to value, although as is to be expected chief reliance is ordinarily placed on earning capacity or on the worth of underlying assets, or on both of those criteria together.² The "choice" of the determinative factor or factors must necessarily be governed by the particular circumstances confronting the evaluator; even the "reasonable man" of torts law fame does not operate in a vacuum, but rather in the setting wherein he is placed.

And so it was with the Tax Court in this instance. It was faced here with an unusual corporate set-up, and with circumstances which certainly could not be considered either "average" or "ordinary". Hence

² See and cf.: *Old Mission Cement Co. v. Commissioner*, *supra*; *Stiles v. Commissioner*, 69 F. 2d 951 (C. C. A. 5th); *Wells Amusement Co. v. Commissioner*, 70 F. 2d 208 (C. C. A. 4th); *White & Wells Co. v. Commissioner*, 50 F. 2d 120 (C. C. A. 2d); *Griffiths v. Commissioner*, 70 F. 2d 946 (C. C. A. 7th); *Phillips v. United States*, 12 F. 2d 598 (W. D. Pa.), reversed on other grounds, 24 F. 2d 195 (C. C. A. 3d).

the court was entirely justified, we believe, in applying to the problem of valuing these stocks the criteria which seemed to it to be most warranted by the peculiar facts of the case. The court was also justified correlatively, we submit, in relegating to the background, as being in its view unreliable indicia of value under the facts, those certain other criteria which the petitioner was stressing in support of her own valuation figures.

As a matter of fact, the petitioner's own witnesses did not "consider", in giving their opinions here, all of the bases named in the Regulations for determining value; they chose largely to ignore every factor except the earnings, past and theoretically potential, of the two corporations.³ And we think, as apparently did the Tax Court, that such stress upon earnings fell far wide the mark of revealing the true value of the securities in question. In the first place, where the value of capital stock is to be ascertained by regarding the earnings of a corporation as the principal factor, it certainly should precedently appear that such earnings are really representative of the company's earning capacity. This entails giving due consideration to such matters as whether the corporation is actively engaged in business with a true motive to obtain all possible profit from available resources, or whether it is primarily engaged in

³ The two principal witnesses for petitioner were Messrs. Eitner and Walker, both of whom testified as experts on valuation. Their testimony appears respectively at pp. 120 *et seq.* and pp. 167 *et seq.* of the Record.

acting as a depository and guardian for the wealth of its stockholders. It entails also inquiring into whether the corporation uses its assets for self-benefit or whether the transactions in which it engages chiefly further, and are purported to further, the private concerns of its shareholders or other persons. In the case now before us, certainly it is clear that the two corporations concerned were much more in the nature of "holding companies" for the Hamburger family funds than they were of true business ventures. It is likewise clear that such intra-corporate transactions as those in which A. Hamburger & Sons, Inc., habitually loaned large sums of money to its stockholders, and to other corporations in which the stockholders had an interest, at abnormally low rates of interest (R. 55), created a condition where the economic benefits of the corporate assets did not go into normal corporate channels but were transferred in large part to others. We submit that this evidence of so artificial a shifting of profits made the corporate earnings nearly useless as a criterion for determining the value of the A. Hamburger & Sons, Inc., shareholdings.

Moreover, both of the petitioner's chief witnesses fixed their earnings-capitalization rate on the assumption that the "willing buyer" of the Regulations would expect a rate of return here comparable with corporations engaged in what were distinctly non-comparable businesses. Thus, they used as presumably "representative", such stocks as American Telephone and Telegraph Company, Pacific Gas and Electric

Company, Consolidated Edison, International Harvester, Standard Oil of California, Chesapeake & Ohio Railroad, Union Pacific Railroad, etc.; and it was on the basis of the average yield of those stocks that the witnesses determined that a buyer would only be "willing" here at a purchase price which would yield a similar rate of return.⁴ The witnesses seemed quite to lose sight of the fact that this was a family corporation, the primary purpose of which was not to produce wealth in the manner that the ordinary industrial concern may be said to produce it, but rather to preserve capital and to collect and distribute whatever increment might accrue on that capital. Admittedly, in the case of a manufacturing corporation or of a public utility, the record of annual earnings is ordinarily of prime importance, but that is because the value of the stock results chiefly from the success of the company in producing profits. The depreciated machinery and equipment employed in the operation of a public utility, for instance, may have little intrinsic worth except to the particular owner; and if the operations of that owner are discontinued, it is even conceivable that the physical assets may be scrapped at junk value. On the other hand in the case of personal holding companies, the value of the assets is not normally dependent upon the operations of the owner, nor otherwise identifiable with him. Such value is ordinarily created and maintained by general economic conditions, and from appreciations in market value having nothing to do

⁴ E. g., R. 133, 136, 143, 151-152, 175-176.

with the owner's activities. In such companies the value of the underlying assets would seem, we submit, to be the soundest basis for judgment on the value of the corporate stock.

There were other weaknesses in petitioner's witnesses' testimony which seem to us patent. Thus it was attempted to discount the value of the shares of both A. Hamburger & Sons, Inc., and Hamburger Realty because it was said that they lacked liquidity. (R. 142.) But here again, while ordinarily inability to realize immediately upon an asset undoubtedly does detract from its value, the weight to be given this feature is surely largely dependent upon the owner's contemplated use of the property; in a case where the stockholder has no particular interest in disposing of his shares as a ~~speculator~~ might, but intends rather to hold them for investment quite irrespective of general market trends, the feature of liquidity may be insignificant when contrasted, for instance, with the feature of security. The decedent in this case, for example, was an elderly woman and a wealthy one; quite clearly in her mind the feature of safety would have dominated over liquidity in determining the price at which she would have parted with any of her investments.

The record in the instant case makes plain that there inhered in the stocks we are now discussing a very high degree of security indeed. The Hamburger Realty Company owned, as its principal asset, a building which was bound to produce rentals totaling \$9,000,000 over a future thirty-year period. A. Ham-

burger & Sons, Inc., had \$640,000 in United States Treasury bonds and certificates, approximately \$400,000 in cash, stock, and bonds, and nearly \$800,000 worth of real estate. (R. 385-388.) Certainly there would be many prospective buyers "willing" to forego the ^{H.H.H.} ~~right~~ rate of yield produced by the securities used as "comparable" by petitioner's witnesses in order to obtain the gilt-edge quality of investment offered in the stocks of the two corporations here under discussion. Accordingly, we submit, the attempt of petitioner's witnesses to discount the value of these stocks by reason of their lack of ready market really avails her case nothing.⁵

Furthermore, as we have mentioned earlier in this discussion, the stockholders of A. Hamburger & Sons, Inc., enjoyed special privileges as such, assuredly not open to the shareholders in many corporations; and that these privileges were of considerable value goes almost without saying. We are referring now to the fact that approximately two million dollars of the corporate assets of that company were loaned to its shareholders or to corporations in which they were interested, some at a two percent rate of interest and some at no interest at all. (R. 385, 388.) The corporation, for example, held a mortgage and trust deed on the

⁵ This feature of security may well have tended also to offset, in the mind of the fact-trier, such "discount" factors as, for example, the probability of increased income tax and the trend of economic conditions on the critical date. See Br. 29-31. Cf. *Zanuch v. Commissioner, supra*, where the imminence of war was urged by the taxpayer as tending to show that the stock exchange quotation did not truly represent fair market value.

estate of the decedent herein to secure some \$55,000, on which loan no interest was apparently being charged. (R. 385.) Most assuredly, a prospective seller would attach considerable value to this rare borrowing privilege in determining the price at which he would sell; and of course we are just as much interested here in the price that a "willing" seller would ask as we are in the price a "willing" buyer would pay. This ability to borrow large sums at very low rates was one of the bundle of rights which a seller would be giving up on the sale of his stock, and its loss would unquestionably be reflected in the price at which buyer and seller would meet. ~~And~~ ^{Certainly} it cannot be presumed that the American Telephone and Telegraph Company or the Pacific Gas and Electric Company, or any of the other corporations used by the petitioner's witnesses for the purpose of establishing the yield that a "willing" purchaser would expect, would loan any substantial sums to its stockholders at such low rates of interest. And that this factor was much in the mind of the fact-trier here is seen in the opinion below, where the Tax Court in another context said (R. 58):

* * * since the management of A. Hamburger & Sons, Inc., have intentionally created a falsely low income by enriching themselves and their other stockholders through interest-free loans, it is held that the incomes of these companies have already received all of the consideration possible in arriving at the evaluation of the stock * * *.

See also R. 52-53.

The petitioner complains too (Br. 18) that the "condition of the management" was not sufficiently considered. By this we assume she means that the Tax Court apparently did not think that the value of the stock should be discounted because of the fact that the stockholders (among whom was the management) friendly terms with each other. Neither do *we* think, were all well past middle age and on exceedingly un- however, that these circumstances were entitled to any great weight. In the first place, the warring shareholders were all represented by attorneys and advisers, presumably capable. (R. 52.) And while the Tax Court found (R. 52) that the inharmonious relations between the stockholders seriously and adversely affected the formation of any business policy of either corporation with the result that such policies remained in *status quo*, that does not seem to us of much consequence in view of the character of the corporations' "business". The management requirements in connection with functions consisting merely of collecting rents, etc., and distributing income to stockholders are obviously practically nil. Add to this too, such facts as that the realty company was assured of a \$300,000 annual income from the building site leased to the May Company department store for thirty years to come—assured regardless of whether the lessor's "management" was young or old, active or inactive, friends or enemies. In all probability nothing short of a national catastrophe would prevent the May Company from fulfilling the terms of the lease; and there was like stability in the income from the realty company's other holdings, both real and personal.

In fact, adopting for the moment the approach of petitioner's witnesses to the problem, and considering the past earnings of the realty company together with other known facts on which to project the estimated corporate income over the future years—but without quite the pessimism that Messrs. Eitner and Walker entertained on the witness stand—the capitalization of the realty company's reasonably expected earnings results in a value for the stock of that corporation closely approximating the value expressed by the Government's witness, Edward H. Allen. (R. 259.) Taking that company's earnings for the six years beginning with 1936 and continuing through 1941, we find that the total income for this period was \$999,526.62, or an average of \$166,587.77 per year (R. 41-42); and by adding to this the sum of \$50,000 on account of the fact that the realty company was to realize an additional yearly income of \$50,000 from the May Company lease beginning in 1943 (R. 50), the average expected income of the foreseeable future totals \$216,587.77 per year. Capitalizing this at five percent, which would seem to be a reasonable rate considering the character of the corporate "business", gives a value to the company's outstanding stock of \$4,331.76 per share; capitalizing it at six percent so as to give every leeway for "risks," always possible however improbable, gives a value on a per share basis of \$3,609.79.⁶ We submit accordingly that whether the view be taken that the underlying assets

⁶ There were 1,000 shares of common stock outstanding in Hamburger Realty Company. (R. 38.)

should be taken as the most important factor, in line with the Tax Court's view, or whether the earnings record of the realty company be deemed to warrant preeminence, the answer is much the same with respect to Hamburger Realty Company at least, i. e., that that corporation's stock was on the pivotal date worth approximately \$3,900 per share, the figure found by the Tax Court.⁷

But at this juncture we again state our view that the Tax Court would have been gravely misled had it accepted the opinions of petitioner's witnesses that capitalized earnings-rate was the proper basis determinative in evaluating these stocks. Not that the Tax Court ignored the earnings-rate factor; we have just quoted from the opinion below the court's statement that it had given to that factor all the consideration it thought was deserved. And we ask, moreover, by what process of reasoning can it be concluded that in order to fix the value of the stocks of corporations such as these, the evaluator should take into consideration how profitable it is to run railroad

⁷ To be sure, petitioner's witness, Eitner, capitalized the realty company earnings at around ten percent. (R. 151-152, 154-155.) He did so, however, largely on account of what he thought were the undesirable features of the stock (R. 154-155); and certainly, as we have stated, the fact-trier might well have considered such features more than offset in the circumstances of the case by the highly desirable and extraordinary features we have previously mentioned. The logical result of such offset would be to fix the capitalization rate somewhere around six or seven percent, and eight plus a fraction at the most, that being what this same witness stated to be the Dow Jones yield-rate averages on industrials, rails, and utilities, as of the basic date (R. 152), and in view of the fact that he was using such stocks as "comparatives" here.

traffic through Maryland, Ohio, and other eastern states, etc., and to ignore, as petitioner's witness Eitner did, what the corporations' basic asset—real estate—was currently yielding in and about the City of Los Angeles. Eitner was asked whether he had made any inquiry into what rate of return Los Angeles real estate was producing; he replied that he had not, “not believing that to be pertinent in relation to the value of the stock.” (R. 127.) Actually, we think it a fair indictment of both the witnesses offered by petitioner that they were “experts” in reducing the earnings of dissimilar corporations to dollar value—and nothing more. In contrast, the Commissioner's witness, Allen, based his opinion to a considerable extent on the real property values which principally underlay the two stocks, although he certainly did not ignore, any more than did the Tax Court, other factors potentially bearing on the point. (R. 243–246, 259–262.) Allen was a man very familiar with real estate values around Los Angeles, having been engaged in the appraisal of many large and small parcels of realty in that vicinity, and having appraised the stocks of many corporations which held property thereabouts. (R. 238–243.) Based upon those many years of experience, Allen stated that in his opinion the stock of Hamburger Realty Company was worth \$3,900 a share and that of A. Hamburger & Sons, Inc. \$1,000 per share, which are the respective values on which the decision below is rested. (R. 259, 262, 53.)

In short, it seems to us that what the Tax Court did here was to exercise an independent judgment after having given due consideration to both parties' evidence, and with full understanding of the controlling rules of law; and the United States Supreme Court has declared that a Tax Court decision, so reached, is entitled to affirmance. *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

CONCLUSION

The decision of the Tax Court should be affirmed.
Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.

HELEN R. CARLOSS,
ROBERT N. ANDERSON,

MARYHELEN WIGLE,

Special Assistants to the Attorney General.

OCTOBER, 1947.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(j) *Optional Valuation.*—If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.10 *Valuation of property*—(a) *General.*—The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; or, if the executor elects in accordance with the provisions of section 81.11, it is the fair market value thereof at the date therein prescribed or such value adjusted as therein set forth. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or

to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the applicable valuation date should be considered in every case.

* * * * *

(c) [as amended by T. D. 5351, 1944 Cum. Bull. 579] *Stocks and bonds*.—The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date.

* * * * *

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Among such other relevant factors to be considered are the values of securities of corporations engaged in the same or a similar line of business which are listed on an exchange. However, the weight to be accorded such comparisons or any other evidentiary factors considered in the determination of a value depends upon the facts of each case. Complete financial and other data upon which the valuation is based should be submitted with the return.

* * * * *

No. 11625.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF BELLE ALICE HAMBURGER NATHAN, EVELYN
HAMBURGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

CLAUDE I. PARKER,
808 Bank of America Building, Los Angeles 14,

RALPH W. SMITH,
919 Oviatt Building, Los Angeles 14,

J. EVERETT BLUM,
810 South Spring Street, Los Angeles 14,

L. A. LUCE,
937 Munsey Building, Washington, D. C.,

Counsel for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

While the value of property for tax purposes is a question of fact as stated by respondent (Br. 16), the question of whether the method used by the trial court was according to law is a question of law.

Laird v. Commissioner, 3 Cir. 85 F. (2d) 598;

Weber v. Rasquin, 2 Cir. 101 F. (2d) 62;

Guggenheim v. Helvering, 2 Cir. 11 F. (2d) 469.

Petitioner's sole theory in this review is that The Tax Court did not consider the various factors of value which the law and the Treasury Regulations require it to consider. If this Honorable Court agrees with petitioner the decision must be reversed.

Nee v. Kats, 47-2 U. S. T. C., Par. 10,569 (C. C. A. 8).

Petitioner has not and does not contend that each factor must be given equal force (Br. 18) but petitioner does contend that each factor must be considered.

We agree with respondent that the “choice” of the determinative factors and the weight to be accorded each factor must be governed by the circumstances of each case. (Br. 18.) But “choice” must necessarily presuppose consideration of the various factors and where there has been no consideration of the various factors, there can be no choice as between them. We submit that the elimination of certain factors from consideration, which elimination is the result of erroneous conclusions and assumptions, as was done in the instant case, does not give rise to a “choice” of determinative factors.

Weber v. Rasquin, 101 F. (2d) 61.

Respondent’s argument on pages 19 to 22, inclusive, of his brief would be pertinent only if directed to the trial court. We are not attempting in this court to determine the value of any property. It may well be that certain witnesses gave more emphasis to the “willing buyer” while others gave more emphasis to the “willing seller,” but that is of no concern to this Court. This court’s function in the instant matter is to determine whether the values found by The Tax Court were arbitrary and excessive; whether the method used by The Tax Court was in accordance with the law and regulations, and in that regard, whether The Tax Court considered all the factors of valuation as to which there was evidence in the record.

We shall not argue with respondent with respect to his arguments or conclusions appearing on pages 22 to 25, inclusive, of his brief. Whether his conclusions are

correct or not is not important on this review. What is important is that by the mention of the various factors, respondent recognizes that those factors are involved herein and that they should have been considered by The Tax Court. That the factors mentioned by the respondent were not considered by The Tax Court appears affirmatively from the opinion rendered by The Tax Court and equally from respondent's footnote on page 23 of his brief. The use of the words "may well have tended" is an attempt to read into the mind of the fact-trier something which, while it should have been considered, was not mentioned or considered by The Tax Court. The fact that The Tax Court made no mention of such factors and disregarded its own findings of fact is affirmative proof that The Tax Court did not consider those factors.

Worcester County Tr. Co. v. Commissioner, 134 F. (2d) 578 at 582;

Nee v. Katz, 47-2 U. S. T. C., Par. 10,569.

Respondent's argument or rather his theorizing as to what might have been is again an admission by respondent that The Tax Court did not consider the factors referred to. Why else in footnote 7, page 27 of his brief, would he say the fact-trier "might well have considered . . ." ? Respondent says in said footnote that the "logical result" of what might have been had The Tax Court considered said referred to factors would be to fix the capitalization rate at 6 per cent or 7 per cent or 8 per cent. Using respondent's own figures of annual foreseeable future income (Br. 26) the resultant values would be approximately \$3,465.44, \$3,032.26, and \$2,697.38 per share, respectively, for Hamburger Realty Company.

Since these capitalization rates would be the “logical result” if The Tax Court had considered the said factors, is this not proof that The Tax Court did not consider these factors, else how could it “logically” determine a value of \$3,900.00 per share?

We heartily agree with respondent that The Tax Court gave like consideration of the various factors as Mr. Allen (Br. 28), which is to say—none. For, although Mr. Allen in answer to direct questions stated he considered each factor [R. 243-246], on cross-examination he could not state as to any one factor how he had taken such factors into consideration. [R. 265-269; 280-281.] Indeed, Mr. Allen testified that if these corporations had shown an average net loss per year instead of an average net income, the stock of these corporations would have been worth more. [R. 273.] Mr. Allen testified that he arrived at his valuations by dividing the net worth of each company by the number of outstanding shares and then rounded the figures off. [R. 262-263-275-285-286-288-291.] The instant case is Mr. Allen’s first case in which he was called to give his opinion as to the value of corporate stocks. All other cases involved real estate values. [R. 255.] And although he claimed to have testified before the Board of Tax Appeals or The Tax Court at least once a year since 1934, he could remember the name of but one case in which he had so testified. [R. 254-255.] And, finally, Mr. Allen testified that the appraisal of a corporate stock is a mere mathematical calculation, which he doesn’t do. He merely determines the value of the real estate and then anybody can divide the number of shares into the net worth. [R. 257-258.] We believe the record shows unequivocally

that Mr. Allen was a real estate appraiser and nothing more [R. 256-257], and gave consideration only to net worth.

The only evidence regarding the value of real estate corporation stocks was given by witnesses called by petitioner and that evidence showed that such stocks were selling at discounts of 50 per cent to 80 per cent of the net worth and for six times earnings. [R. 219.]

Petitioner submits that the rule laid down in *Dobson v. Commissioner*, 320 U. S. 489, no longer obtains, in view of the recently enacted Administrative Procedure Act, 5 U. S. C. A., Sec. 1001, *et seq.*, which, among other things, provides for review of decisions of administrative agencies. This Act provides that reviewing courts may set aside agency action, findings, and conclusions which are not supported by substantial evidence.

That The Tax Court is such an agency is hardly open to argument. The act creating the Board of Tax Appeals provided that the Board was "an independent agency in the executive branch of the government." 53 Stats. 158, 26 U. S. C. A., Sec. 1100. See, also, *Old Colony Trust Co. v. Comm.*, 279 U. S. 716. When the name of the Board was changed to The Tax Court, the Revenue Act of 1942 provided: ". . . the jurisdiction, powers and duties of the Tax Court . . . shall be the same as by existing law provided in the case of the Board of Tax Appeals." Revenue Act of 1942, Sec. 504.

The Supreme Court of the United States, in *Commissioner v. Gooch Milling & Elevator Co.*, 320 U. S. 418, held the Board to be an agency. This case was decided in December, 1943, after the Board had become The Tax

Court. See, also, *Hutchings-Sealy Nat'l Bank v. Comm.*, 141 F. (2d) 422, holding The Tax Court to be an agency.

In *Lincoln Electric Co. v. Commissioner* (6 Cir.), 47-1 U. S. T. C., par. 9282, the Court held the Administrative Procedure Act applied to The Tax Court and the *Dobson* case no longer applied.

In view of the foregoing, we submit that The Tax Court is subject to the Administrative Procedure Act and that this Court has full power of review thereunder.

Conclusion.

The decision of The Tax Court should be reversed and the case remanded with instructions to afford the parties an opportunity for further hearing.

Respectfully submitted,

CLAUDE I. PARKER,
RALPH W. SMITH,
J. EVERETT BLUM,
L. A. LUCE,

Counsel for Petitioner.

No. 11626

United States
Circuit Court of Appeals
For the Ninth Circuit.

LILY HO QUON and ALBERT T. QUON,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

No. 11626

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

GEORGE T. ALTMAN.

For Commissioner:

H. A. MELVILLE.

Docket No. 5805

LILY HO QUON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1944

Aug. 14—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 15—Copy of petition served on General Counsel.

Sept. 21—Answer filed by General Counsel.

Sept. 21—Request for Circuit hearing in Los Angeles, Cal., filed by General Counsel.

Sept. 26—Notice issued placing proceeding on Los Angeles calendar. Service of answer and request made.

1946

Apr. 16—Hearing set June 10, 1946, Los Angeles.

May 27—Motion for a continuance until after 12/31/46 filed by taxpayer. Granted.

May 31—Motion to consolidate proceedings filed by taxpayer.

Oct. 31—Hearing set 11/4/46, Los Angeles, Cal.

Nov. 13—Hearing had before Judge Hill on merit and 14 its. Motion of counsel to consolidate

1946

granted. Deposition of Albert T. Quon to be taken by Wednesday, 11/20/46, if desired. Simultaneous briefs due 12/30/46. Reply due 1/29/47.

Nov. 18—Stipulation that petitioner in Docket 5806 offer in evidence the original letter to George T. Altman, dated 10/6/43, signed by Albert T. Quon in lieu of deposition of Albert T. Quon filed.

Dec. 4—Transcript of hearing 11/13/46 filed.

Dec. 4—Transcript of hearing 11/14/46 filed.

Dec. 16—Motion for extension to Jan. 28, 1947, to file original briefs and Feb. 27, 1947, to file reply brief filed by taxpayer. 12/17/46 Granted.

1947

Jan. 27—Brief filed by taxpayer. 1/29/47 served.

Jan. 28—Brief filed by General Counsel.

Feb. 24—Reply brief filed by taxpayer. 2/25/47 copy served.

Feb. 26—Granted for extension to March 14, 1947, to file reply brief filed by General Counsel. 2/27/47 Granted.

Mar. 13—Reply brief filed by General Counsel.

Mar. 28—Memorandum findings of fact and opinion rendered, Judge Hill. Decision will be entered for the respondent.

1947

Mar. 31—Decision entered, Judge Hill, Div. 2.

Apr. 14—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit filed by taxpayer. [1*]

Apr. 14—Designation of contents of record on review filed by taxpayer.

Apr. 14—Statement of points filed by taxpayer.

Apr. 15—Proof of service of petition for review and statement of points filed.

Apr. 15—Proof of service of designation of contents of record on review filed. [2]

Docket No. 5806

ALBERT T. QUON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1944

Aug. 14—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 15—Copy of petition served on General Counsel.

Sept. 21—Answer filed by General Counsel.

* Page numbering appearing at top of page of original certified Transcript of Record.

1944

Sept. 21—Request for hearing in Los Angeles, Cal., filed by General Counsel.

Sept. 26—Notice issued placing proceedings on Los Angeles calendar. Service of answer and request made.

1946

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May 27—Motion for a continuance until after 12/31/46 filed by taxpayer. Granted.

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Oct. 31—Hearing set 11/4/46, Los Angeles, Cal.

Nov. 13—Hearing had before Judge Hill on merits. Motion of counsel to consolidate granted. Deposition of Albert T. Quon to be taken by Wednesday, 11/20/46, if desired. Simultaneous briefs due 12/30/46. Reply 1/29/47.

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Dec. 4—Transcript of hearing 11/13/46 filed.

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1946

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Mar. 31—Decision entered, Judge Hill, Div. 2.

Apr. 14—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit filed by taxpayer.

Apr. 14—Designation of contents of record on review filed by taxpayer.

Apr. 14—Statement of points filed by taxpayer.

Apr. 15—Proof of service of petition for review and statement of points filed.

Apr. 15—Proof of service of designation of contents of record on review filed. [3]

The Tax Court of the United States

Docket No. 5806

ALBERT T. QUON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions this court for a redetermination of his federal income tax liabilities for the taxable year ended December 31st, 1941, as determined by the Commissioner of Internal Revenue in a notice of deficiency (Bureau symbols LA:IT:90D:PB), and as a basis of this proceeding alleges as follows:

1. That the petitioner is an individual residing at 1051 South Gramercy Place, Los Angeles 6, California; and that he filed a return for the year involved herein with the Collector for the Sixth District of California.

2. That the notice of deficiency, a copy of which marked Exhibit "A" is attached hereto, was mailed to the petitioner on May 27th, 1944.

3. That the deficiency determined by the Commissioner was \$9,835.08, and that the entire amount thereof is involved in this proceeding.

4. That the determination of tax as set forth in said notice of deficiency is based upon the following

error: Inclusion in the [4] gross income of the petitioner of an amount of \$18,189.88, alleged to have been derived by the petitioner from certain trusts.

5. The facts upon which petitioner relies as sustaining the above assignments of error are as follows:

(a)(1) That on or about May 1st, 1941, he and his wife, Lily Ho Quon, as trustors, executed an indenture of trust naming their daughter, Lillian Mae Quon, sole beneficiary and one Nathan Quon trustee, and transferring to the said trust an undivided 12½% interest in a certain importing and sales business known as Quon-Quon Company and theretofore owned by the trustors as community or joint property, a copy of the said indenture of trust being attached hereto and marked Exhibit "B".

(a)(2) That also on or about the 1st day of May, 1941, the petitioner and his wife, Lily Ho Quon, as trustors, executed a trust naming their daughter, Alberta Pauline Quon, as beneficiary, and one King Quon as trustee, the said indenture being in all other respects the same as the indenture a copy of which is attached hereto as Exhibit "B".

(a)(3) That also on or about the 1st day of May, 1941, the petitioner and his wife, Lily Ho Quon, as trustors, executed a trust naming their daughter, Jeannette Quon, as beneficiary and one C. Melvin McCuen as trustee, the said indenture being in all other respects the same as the indenture a copy of which is attached hereto as Exhibit "B".

(a)(4) That also on or about the 1st day of May, 1941, the petitioner and his wife, Lily Ho Quon, as trustors, executed a trust [5] naming their son, Ronald Quon, as beneficiary and one Quon Hong Kuey as trustee, the said indenture being in all other respects the same as the indenture a copy of which is attached hereto as Exhibit "B".

(a) That immediately upon the execution of the said trusts, petitioner and his wife, together with the trustees hereinabove named, formed a limited partnership under the laws of the State of California, naming petitioner and his wife as general partners and the said trustees as limited partners, transferring thereto their respective interests in said Quon-Quon Company, and filing and recording a copy of the Certificate of Limited Partnership, a copy thereof being attached hereto and marked Exhibit "C".

(c) That all of the trustees named in the said trusts are mature business men and that each of them is engaged in a separate business and that none of them is subject to the influence and control of the petitioner.

(d) That under the agreement of limited partnership contained in the Certificate a copy of which is attached hereto as Exhibit "C" any limited partner can withdraw from the partnership and thereby cause the dissolution of the said partnership.

(e) That the petitioner is a Chinese citizen and that he was prompted in the creation of the said trusts chiefly by the effects [6] of said citizenship and more particularly, because of the freezing of funds of certain alien residents in pursuance of Executive Order 8389 issued April 10th, 1940; that because of said conditions with respect to the funds of alien residents and the general uncertainties resulting therefrom, petitioner was impelled to protect his children who are United States citizens by setting up the trusts involved herein.

(f) That distribution of income were made by the said partnership during the taxable year involved herein and that the said distributions were invested by the trustees in high-grade securities.

(g). That the beneficial interests created by the said trusts are valid, subsisting and irrevocable and that no portion of the income therefrom belongs to the petitioner.

Wherefore, petitioner prays that the Tax Court may hear this petition and determine that there is no deficiency due from the petitioner, and for such other relief as the Court may deem proper.

/s/ GEORGE T. ALTMAN,

Attorney for Petitioner,

215 West Seventh Street,

Los Angeles 14, California.

State of California,
County of Los Angeles—ss.

Albert T. Quon, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts therein stated are true.

/s/ ALBERT T. QUON.

Subscribed and sworn to before me this 10th day of August, 1944.

/s/ ALICE KORT,

Notary Public in and for said County and State.

My commission expires 12/20/46. [7]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles, 13, California

May 27, 1944

Office of Internal Revenue Agent in Charge
Los Angeles Division

Mr. Albert T. Quon
1051 South Gramercy place
Los Angeles, 6, California

Dear Mr. Quon:

You are advised that the determination of your income tax liability for the taxable year ended De-

cember 31, 1941, discloses a deficiency of \$9,835.08, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States at its principal address, Washington, D.C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

very truly yours,

ROBERT E. HANNEGAN,

Commissioner,

By (Signed) GEORGE D. MARTIN

Internal Revenue Agent
in Charge.

PB:VaC

Enclosures:

Statement

Form of Waiver [8]

Statement

LA:IT:90D:PB

Mr. Albert T. Quon
 1051 South Gramercy Place
 Los Angeles 6, California

Tax Liability for the Taxable Year
 Ended December 31, 1941

	Liability	Assessed	Deficiency
Income tax	\$17,718.01	\$7,882.93	\$9,835.08

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 30, 1943, to your protest dated October 13, 1943, and to the statements made at the conference held.

A copy of this letter and statement has been mailed to your representative, Mr. George T. Altman, 215 West Seventh Street, Los Angeles 14, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Net income as disclosed by return.....	\$26,816.67
Additional income:	
Income of trusts.....	18,189.88
Net income adjusted	<u>\$46,006.55</u>

Explanation of Adjustment

Income reported in the aggregate amount of \$36,379.76 in the fiduciary returns filed for the alleged Ronald Quon, Jeanette Quon, Alberta Pauline Quon and Lillian Mae Quon trusts, purportedly established for your four minor children

by you and your spouse, as [9] so-called co-trustors, is includable in your income to the extent of the \$18,189.88 under the provisions of section 22(a), 166 and 167 of the Internal Revenue Code.

Computation of Alternative Tax

Net income adjusted.....		\$45,006.55
Plus: Net long-term capital loss.....		771.48
		<hr/>
Ordinary net income.....		\$45,778.03
Less: Personal exemption	\$ 350.00	
Credit for dependents.....	1,200.00	1,550.00
		<hr/>
Balance (surtax net income).....		\$44,228.03
Less: Earned income credit.....		557.16
		<hr/>
Net income subject to normal tax.....		\$43,670.87
Normal tax at 4% on \$43,670.87.....	\$ 1,746.83	
Surtax on \$44,228.03.....	16,205.42	
		<hr/>
Partial tax		\$17,952.25
Minus: 30% of net long-term capital loss.....		231.44
		<hr/>
Alternative tax		\$17,720.81

Computation of Tax

Net income adjusted.....		\$45,006.55
Less: Personal exemption	\$ 350.00	
Credit for dependents.....	1,200.00	1,550.00
		<hr/>
Balance (surtax net income).....		\$43,456.55
Less: Earned income credit.....		557.16
		<hr/>
Net income subject to normal tax.....		\$42,899.39
Normal tax at 4% on \$42,899.39.....	\$ 1,715.98	
Surtax on \$43,456.55	15,791.97	
		<hr/>
Total		\$17,507.95

Alternative tax	\$17,720.81
Less: Income tax paid at source.....	2.80
<hr/>	
Correct income tax liability.....	\$17,718.01
Income tax assessed:	
Original, account No. 374712.....	7,882.93
<hr/>	
Deficiency of income tax.....	\$ 9,835.08

EXHIBIT "B"

LILLIAN MAE QUON TRUST

This Indenture of Trust, made and executed this first day of May, 1941, by and between Albert T. Quon and Lily Ho Quon, his wife, both of the City of Los Angeles, County of Los Angeles, State of California, Trustors, and Nathan Quon, now residing at 1179 Fifth Avenue in the city of San Diego, California, Trustee,

Witnesseth:

That Whereas Albert T. Quon now owns and operates an importing and sales business under the firm name of "Quon-Quon Company" at 843 South Los Angeles Street in the city of Los Angeles, California, which business is community or joint property of Trustors; and

Whereas Lillian Mae Quon, who was born on August 1st, 1932, is the daughter of Trustors; and

Whereas Trustors desire to make provision and settlement for the benefit of their said daughter by irrevocable transfer and conveyance, in trust, of an interest in said business,

Now, Therefore, Trustors do hereby irrevocably assign, grant, convey, transfer and deliver to Trustee and to his successor or successors, an undivided twelve and one-half percent ($12\frac{1}{2}\%$) interest in the aforesaid business, subject to the terms and provisions of the Certificate of the Limited Partnership hereinafter referred to, in trust, to hold, manage and distribute as hereinafter provided, to-wit:

1. Concurrently with the execution of this indenture, said business shall be reorganized as a limited partnership and Trustee shall become a limited partner therein. As such limited [12] partner and as Trustee under this Trust Agreement, he shall have a twelve and one-half percent ($12\frac{1}{2}\%$) interest in said business and shall be entitled to receive twelve and one-half percent ($12\frac{1}{2}\%$) of the net profits therefrom and said share of the profits shall be credited to the Trustee and distributed to him from time to time, pro rata with distribution to the general partners in said business.

2. Trustors shall be general partners in said limited partnership. Said limited partnership shall continue for twenty-five (25) years unless sooner terminated by the death, withdrawal or transfer of interest of one of the general or limited partners.

3. To carry out the purposes of this trust and subject to any limitations herein expressed, the Trustee is vested with the following powers and

discretions, in addition to any now or hereafter conferred by law, affecting the trust and the trust estate:

a. Upon termination, dissolution or reorganization of said limited partnership, to reinvest his distributive share of the proceeds therefrom, or any part thereof, in the capital assets or capital stock of any partnership, corporation or other company which may be organized for the purpose of acquiring the assets and continuing the operation of said business.

b. To sell or exchange trust assets and to purchase other assets or invest trust funds and/or to borrow money and to obligate the trust estate for the repayment thereof and/or to encumber the trust estate or any part thereof by mortgage, deed of trust, pledge or otherwise, only with the written consent of the beneficiary after she reaches the age of twenty-one (21) years and [13] only with the written consent of the parents or legal guardian of the beneficiary before she reaches the age of twenty-one (21) years. If the parents of beneficiary die before termination of this trust, the Trustee is requested to seek and consider the advice of the Trustees of the trust estates created concurrently herewith for the benefit of the other children of Trustors before selling or exchanging trust assets, investing trust funds, borrowing money for the benefit of the trust estate and/or encumbering the trust estate or any part thereof.

4. When said beneficiary, Lillian Mae Quon, shall reach the age of twenty-one (21) years, the Trustee shall thereafter pay to her from the income and/or principal of the trust estate, such amount as in his discretion is necessary to enable her to maintain the standard of living to which she has been theretofore accustomed if her parents or surviving parent or husband is not ready, willing and able to then provide such adequate funds for her. Provided, however, that said monthly payments for the maintenance of said beneficiary shall not exceed the current net income from said trust estate unless such net income shall be less than One Hundred Dollars (\$100.00) per month, in which event such payments may be made partially or wholly from accumulated income or capital.

5. When the beneficiary reaches the age of twenty-one (21) years the Trustee shall pay or transfer to beneficiary one-fourth ($\frac{1}{4}$) of the accumulated income and principal of said estate, other than the partnership interest in said Quon-Quon Company or the successor thereof if said business has not been theretofore [14] liquidated. When said beneficiary shall reach the age of twenty-five (25) years the Trustee shall pay to her one-third ($\frac{1}{3}$) of the remaining accumulated income and principal of said trust estate, other than the partnership interest in Quon-Quon Company or the successor thereof if said business has not been theretofore liquidated. When said beneficiary shall reach the age of thirty (30) years the Trustee shall pay to her one-half ($\frac{1}{2}$) of the remaining accu-

mulated income and principal of said trust estate, other than the partnership interest in Quon-Quon Company or the successor thereof if said business has not been theretofore liquidated. When said beneficiary reaches the age of thirty-five (35) years the Trustee shall pay and/or transfer to her the entire remaining estate and this trust shall thereupon terminate.

6. Should said beneficiary die before reaching the age of twenty-one (21) years, the remainder of the trust estate shall go immediately to her issue, or if she should die without issue before reaching the age of twenty-one (21) years, then the remainder of said trust estate shall be divided equally and one part shall be transferred and added to each of the then existing trust estates of the surviving children of Trustors, which trust estates are created by Trustors concurrently here with or which may be hereafter created by Trustors. If the beneficiary shall die after reaching the age of twenty-one (21) years the remainder of said trust estate shall thereupon be distributed to her heirs, devisees or legatees, subject to administration of her estate.

7. The interests of the beneficiary in principal or income shall not be subject to claims of her creditors or others nor [15] to legal process, and may not be voluntarily or involuntarily alienated or encumbered.

8. The Trustee shall, upon written request of the beneficiary at anytime after she reaches the

age of twenty-one (21) years or upon written request of her parents or legal guardian before she reaches the age of twenty-one (21) years, procure a fidelity bond in an amount specified in such request but not exceeding the value of the trust estate, insuring the trust estate and beneficiary against any loss resulting from his defalcation or breach of trust. The premiums on such bonds shall be payable out of trust funds.

9. The Trustee shall be entitled to receive reasonable compensation from the trust estate for his services. For his ordinary and usual duties in receiving, depositing, disbursing and keeping a record of trust funds and filing tax return, said compensation shall be Fifty Dollars (\$50.00) per year. Any additional compensation for extraordinary services rendered by the Trustee shall be payable only on the approval of a court of competent jurisdiction.

10. If the Trustee is temporarily absent from the State of California for an extended period by reason of Military Service or otherwise a co-trustee may be appointed by a court of competent jurisdiction to act during the absence of the regular Trustee. Such co-trustee shall have all of the authority of the regular Trustee during the latter's absence from the State.

11. The Trustee may resign this trusteeship at any time by filing an application with a court of competent jurisdiction [16] stating his desire to resign and requesting the court to appoint a suc-

cessor Trustee. Such resignation shall not become effective until a new Trustee is appointed and has accepted said appointment whereupon the retiring Trustee shall account to and turn over to the new Trustee all of the assets of the trust estate.

In Witness Whereof Trustors have executed this Indenture on the day and year first above written.

ALBERT T. QUON

LILLY HO QUON

Trustors.

I hereby accept the foregoing Trust and agree to hold, use, disburse and distribute the Trust Estate and to perform the duties of Trustee in accordance with the provisions of the foregoing Trust Indenture.

Dated: May 1st, 1941.

Nathan Quon

Trustee. [17]

State of California,
County of Los Angeles—ss.

On This 1st day of May, 1941, before me, Raymond B. Wells, a Notary Public in and for said County and State, personally appeared Albert T. Quon and Lily Ho Quon known to me to be the persons whose names are subscribed to the foregoing Indenture of Trust, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal the day and year in this Certificate first above written.

.....

Notary Public in and for said County and State.

[Notarial Seal] [18]

EXHIBIT "C"

CERTIFICATE OF LIMITED PARTNERSHIP OF QUON-QUON COMPANY

The undersigned, being desirous of forming a limited partnership pursuant to the laws of the State of California, do hereby make and severally sign the following certificate for that purpose.

I.

The name under which the partnership is to be conducted is Quon-Quon Company.

II.

The character of the business and the purpose of said partnership is to acquire, own and operate the importing and sales business now owned and being operated by Albert T. Quon under the firm name of Quon-Quon Company at 843 South Los Angeles Street in the city of Los Angeles, County of Los Angeles, State of California. The partnership may engage in any other line of business for which its present or future assets and facilities may be adaptable.

III.

The location and principal place of business of said partnership shall be 843 South Los Angeles Street, Los Angeles, California. The mailing address of said business is 843 South Los Angeles Street, Los Angeles, California. [19]

IV.

The place of residence of each member of said partnership is as follows:

Albert T. Quon, general partner, 1051 South Gramercy Place, Los Angeles, California;

Lily Ho Quon, general partner, 1051 South Gramercy Place, Los Angeles, California;

King Quon, limited partner, 1179 Fifth Avenue, San Diego, California;

Nathan Quon, limited partner, 1179 Fifth Avenue, San Diego, California;

C. Melvin McCuen, limited partner, 401 Twenty-third Street, Santa Monica, California;

Quon Hong Kuey, limited partner, 397 South Coast Boulevard, Laguna Beach, California.

V.

(a) The term for which the Partnership is to exist is twenty-five (25) years.

(b) The Partnership shall be dissolved upon the occurrence of any of the following circumstances:

(1) The expiration of twenty-five (25) years from the date hereof.

(2) The death of any general or limited partner.

(3) The transfer or attempted transfer, voluntary or involuntary, of the interest of any general or limited partner in the Partnership; provided, however, [20] that the substitution of a new Trustee as a limited partner, pursuant to the provisions of paragraph X hereof, shall not be deemed such a transfer.

(4) The retirement or withdrawal from the Partnership of any general or limited partner. If any general or limited partner desires at any time to withdraw or retire from the Partnership, he or she shall, at least two calendar months prior to such withdrawal or retirement, give the remaining general and limited partners a notice in writing of his or her intention so to do, which notice may be withdrawn at any time prior to the expiration of the first calendar month. If such notice is not so withdrawn, such withdrawal or retirement from the Partnership shall occur and become effective on the last day of the second calendar month.

(c) Notwithstanding any such dissolution, this agreement shall remain in force for the purpose of governing the rights and duties of the parties hereto, until the Partnership has been terminated within the meaning of Section 2424 of the Civil Code of California.

VI.

General Partner, Albert T. Quon, will contribute to the partnership an undivided twenty-five percent

(25%) interest in all of the assets of the aforesaid business now conducted under the firm name of Quon-Quon Company, subject to a pro rata share of the liabilities of said business.

General Partner, Lily Ho Quon, will contribute to the [21] partnership an undivided twenty-five percent (25%) interest in all of the assets of the aforesaid business now conducted under the firm name of Quon-Quon Company, subject to a pro rata share of the liabilities of said business.

Limited Partner, King Quon, will contribute to the partnership an undivided twelve and one-half percent ($12\frac{1}{2}\%$) interest in all of the assets of the aforesaid business now conducted under the firm name of Quon-Quon Company, subject to a pro rata share of the liabilities of said business.

Limited Partner, Nathan Quon, will contribute to the partnership an undivided twelve and one-half percent ($12\frac{1}{2}\%$) interest in all of the assets of the aforesaid business now conducted under the firm name of Quon-Quon Company, subject to a pro rata share of the liabilities of said business.

Limited Partner, C. Melvin McCuen, will contribute to the partnership an undivided twelve and one-half percent ($12\frac{1}{2}\%$) interest in all of the assets of the aforesaid business now conducted under the firm name of Quon-Quon Company, subject to a pro rata share of the liabilities of said business.

Limited Partner, Quon Hong Kuey, will contribute to the partnership an undivided twelve and one-half percent ($12\frac{1}{2}\%$) interest in all of the assets of the aforesaid business now conducted under

the firm name of Quon-Quon Company, subject to a pro rata share of the liabilities of said business.

The assets of said business contributed by the general and limited partners consist of the lease on the premises now being used by said business consisting of the second and third floors of the building located at 843 South Los Angeles Street, Los [22] Angeles, California, all of the furniture and fixtures, merchandise and accounts and notes receivable and all cash on hand and in bank, subject to all notes, accounts payable and other liabilities of said business, all as reflected by the books of account of said business, at the commencement of business on May 1st, 1941. The agreed value of the interest in said business contributed by each limited partner is \$11,268.06.

VII.

Each limited partner and each of the general partners has agreed and does hereby agree to contribute to the partnership capital a pro rata amount, based on his or her respective interest in said partnership assets and profits, only out of his or her share of the net profits from said business, sufficient in the aggregate to pay all obligations of said business heretofore or hereafter incurred and to provide adequate working capital.

VIII.

No definite time has been agreed upon for the return of the contributions of the limited partners. Their pro rata shares of the capital assets of the partnership shall be returned to them, concurrently

and pro rata with distribution to the general partners, upon termination of the partnership and liquidation of its assets.

IX.

Each limited partner shall receive twelve and one-half percent ($12\frac{1}{2}\%$) of the net profits of the partnership business. In determining the net profits a nominal salary, not exceeding the sum of Six thousand dollars (\$6,000.00) per year, may, at his option, be credited and paid to Albert T. Quon while he is actively [23] engaged in the management of said business and any such salary so credited and/or paid to said general partner shall, as between the parties hereto, be deemed to be an operating expense and not part of the profits of said business. The right to receive any such salary for any part of any calendar year shall be deemed to have been waived by said general partner excepting as to such amounts as may be actually credited as salary to said general partner in the books of account of said business on or before the last day of each respective calendar year.

X.

Limited partner, King Quon, holds all of his said partnership interest as Trustee for Alberta Pauline Quon; Nathan Quon holds all of his said partnership interest as Trustee for Lillian Mae Quon; C. Melvin McCuen holds all of his said partnership interest as Trustee for Jeannette Quon; Quon Hong Kuey holds all of his said partnership interest as

Trustee for Ronald Quon; each pursuant to the terms of a trust agreement dated May 1st, 1941, and executed by Albert T. Quon and Lily Ho Quon, Trustors. In the event that any of said limited partners ceases to act as Trustee of said respective trust, his successor Trustee may be substituted as a limited partner in his place.

In Witness Whereof, the parties hereto have executed this agreement on the 1st day of May, 1941.

ALBERTA T. QUON

LILY HO QUON

General Partners

C. MELVIN McCUEN

Limited Partner

NATHAN QUON

KING QUON

QUON HONG KUEY

Limited Partners [24]

State of California,
County of Los Angeles—ss.

Albert T. Quon, Lily Ho Quon and C. Melvin McCuen, being each duly sworn says that he and she executed the foregoing Certificate of Limited Partnership and that all of the matters therein stated are true.

ALBERT T. QUON

LILY HO QUON

C. MELVIN McCUEN

Subscribed and sworn to before me this 1st day of May, 1941.

RAYMOND B. WELLS

Notary Public in and for said County and State.

[Seal]

State of California,
County of Orange—ss.

Quon Hong Kuey, being duly sworn says that he executed the foregoing Certificate of Limited Partnership and that all of the matters therein stated are true.

QUON HONG KUEY

Subscribed and sworn to before me this 1st day of May, 1941.

MARIE TROST

Notary Public in and for said County and State.

My commisison expires Nov. 17, 1941.

[Seal] [25]

State of California,
County of San Diego—ss.

King Quon and Nathan Quon, being each duly sworn says that he executed the foregoing Certificate of Limited Partnership and that all of the matters therein stated are true.

KING QUON

NATHAN QUON

Subscribed and sworn to before me this 1st day of May, 1941.

N. STEINMETZ

Notary Public in and for said County and State.

[Seal]

Received and filed Aug. 14, 1944. [26]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the allegations contained in paragraph 4 of the petition.

5. (a)(1) to (a)(4), inclusive. Denies the allegations contained in subparagraphs (a)(1) to (a)(4), inclusive, of paragraph 5 of the petition.

(b) to (g), inclusive. Denies the allegations contained in subparagraphs (b) to (g), inclusive, of paragraph 5 of the petition. [27]

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. Neblett,
Division Counsel.
Earl C. Crouter,
B. M. Coon,
Special Attorneys,
Bureau of Internal Revenue.

BMC/mm 9/11/44.

Received and filed Sept. 21, 1944. [28]

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION

Hill, Judge: Respondent determined a deficiency in the income tax of each petitioner for the year 1941 in the amount of \$9,835.08. The question is whether certain income reported as trust income is taxable to petitioners. Petitioners filed separate returns for 1941 on a community basis with the collector of internal revenue for the sixth district of California at Los Angeles. The cases were consolidated at the hearing. [29]

FINDINGS OF FACT

Petitioners are husband and wife residing in Los Angeles, California. Unless otherwise indicated petitioner will hereinafter be used to refer to Albert T. Quon. Petitioner is a resident alien. Petitioner, Lily Ho Quon, is a citizen. Prior to May 1941 petitioner, as sole proprietor, operated a business under the name of Quon-Quon Company. The business involved importing Chinese decorative merchandise and wholesaling it.

On May 1, 1941, petitioners, as co-trustors, created four separate trusts, one for each of their four children, Alberta Pauline born June 19, 1930, Lillian Mae born August 1, 1932, Jeanette born February 12, 1936, and Ronald born May 7, 1937. These children are all citizens. Concurrently with the creation of these trusts Quon-Quon Company was reorganized as a partnership, petitioners being constituted general partners and the trustees of the four trusts being constituted limited partners.

Each of the four trusts, as here material, are essentially similar except for the identity of the beneficiaries and trustees. Ronald's trust will be described as typical of all the trusts. Ronald's trust indenture recites that petitioner owns and operates Quon-Quon Company and that petitioners desire to make provision and settlement for their son by irrevocable transfer in trust of an interest in such business. Petitioners, as co-trustors, irrevocably assigned to Ronald's trustee an undivided $12\frac{1}{2}$ per cent interest in the business of Quon-Quon

Company, subject to the terms of the partnership hereafter described. The trust instrument provides that: [30]

1. Concurrently with the execution of this indenture, said business shall be reorganized as a limited partnership and Trustee shall become a limited partner therein. As such limited partner and as Trustee under this Trust Agreement, he shall have a twelve and one-half percent ($12\frac{1}{2}\%$) interest in said business and shall be entitled to receive twelve and one-half percent ($12\frac{1}{2}\%$) of the net profits therefrom and said share of the profits shall be credited to the Trustee and distributed to him from time to time, pro rata with distribution to the general partners in said business.

2. Trustors shall be general partners in said limited partnership. Said limited partnership shall continue for twenty-five (25) years unless sooner terminated by the death, withdrawal or transfer of interest of one of the general or limited partners.

The trustee is vested with power:

a. Upon termination, dissolution or reorganization of said limited partnership, to reinvest his distributive share of the proceeds therefrom, or any part thereof, in the capital assets or capital stock of any partnership, corporation or other company which may be organized for the purpose of acquiring the assets and continuing the operation of said business.

The trustee is further authorized to sell or exchange trust assets, purchase other assets, invest trust funds or borrow money and obligate or encumber the trust estate therefor, all only with the written consent of the beneficiary after he attains 21 years of age or only with the written consent of the beneficiary's parents prior to such time.

The trust instrument provides that when Ronald reaches 21 years of age the trustee shall thereafter pay him from the income and/or the principal of the trust estate such amount as in the trustee's discretion is necessary to enable Ronald to maintain the standard of living to which he has been theretofore accustomed if his parents or surviving parent is not ready, willing and able to provide such funds for him. [31]

When Ronald successively reaches the ages of 21, 25 and 30, the trustee shall pay him, respectively, one-fourth, one-third and one-half of the then accumulated income and principal of the trust estate other than the partnership interest in the Quon-Quon Company. When Ronald reaches 35 years of age the trustee shall pay him the entire remaining estate and the trust shall terminate. If Ronald should die before attaining 21 years of age, the trust estate goes to his issue or, if none, equally to the remaining trusts. If Ronald dies after reaching 21 years of age, the trust estate goes to his heirs, devisees or legatees.

The trustee is entitled to compensation for ordinary and usual services in the amount of \$50 a year. If the trustee is to be absent from the State

of California for an extended period of time a co-trustee may be appointed by a competent court to act during such period of absence. If the trustee resigns a competent court shall appoint a successor.

Concurrently with the creation of the trusts, Quon-Quon Company was reorganized into a partnership. Petitioners were general partners, each having a 25 per cent interest, and the four trustees of the four trusts were limited partners, each having a $12\frac{1}{2}$ per cent interest in the partnership. Each general partner contributed to the partnership an undivided 25 per cent interest in the Quon-Quon Company business. Each limited partner contributed to the partnership an undivided $12\frac{1}{2}$ per cent interest in such business, such $12\frac{1}{2}$ per cent interest being valued at \$11,268.06.

The partnership is for a term of 25 years. It can be dissolved by the death of a general or limited partner, the transfer or attempted transfer [32] of the interest of any general or limited partner, the retirement or withdrawal from the partnership of any general or limited partner. The substitution of a successor trustee as a limited partner does not operate to dissolve the partnership. The partnership agreement provides.

VII.

Each limited partner and each of the general partners has agreed and does hereby agree to contribute to the partnership capital a pro rata amount, based on his or her respective interest in said partnership assets and profits, only out of his or her share of the net profits from said

business, sufficient in the aggregate to pay all obligations of said business heretofore or hereafter incurred and to provide adequate working capital.

VIII.

No definite time has been agreed upon for the return of the contributions of the limited partners. Their pro rata shares of the capital assets of the partnership shall be returned to them, concurrently and pro rata with distribution to the general partners, upon termination of the partnership and liquidation of its assets.

Petitioner discussed the advisability of creating trusts for his children as early as 1939 but nothing was then done. In 1940 petitioner went to China to purchase merchandise for the business and was absent from this country approximately from April to August, inclusive. During this period an employee named Fung was in control of the business and operated it. After petitioner returned from China in August 1940 he became concerned over the possibility that his business assets might be frozen by executive order since certain alien property in this country was becoming subject to such controls. Early in 1941 petitioner discussed the problem with various friends and advisors. The plan to create the trusts and the partnership, which was [33] executed May 1, 1941, grew out of these discussions and was prompted by various considerations. One consideration was petitioner's parental desire to make provision for the security of his

children. Another consideration was the fear of having the business assets frozen by the Government since petitioner's children and wife were citizens and partial ownership of the business assets was considered a practical method of avoiding seizure to such extent. Another consideration was the reduction of taxes.

After the creation of the partnership the business continued to be conducted in all material respects in the same manner as it had been conducted prior to the partnership. The limited partners played no part in the conduct of the business. Capital and drawing accounts were set up on the partnership books for each limited partner. To each limited partner's capital account was credited 12½ per cent of the partnership's net profit. Checks were drawn from time to time by petitioner on the partnership's commercial account, payable to various banks and brokers, which checks were ratably charged against the limited partner's drawing accounts. These checks were drawn to purchase securities which were delivered by petitioner to the trustees. Later the trustees themselves directly purchased securities for the trusts from amounts credited to them on the partnership books. These purchases were approved by the petitioners as parents of the beneficiaries.

On petitioners' returns the income from Quon-Quon Company from January 1 to April 30, 1941, inclusive, the period prior to the formation of the partnership, was shown in the amount of \$40,580.19, which amount included petitioner's salary of \$4,000

from the partnership for the 8-month [34] period. This amount was also reported on a community basis. Each trust reported as its share of the partnership income for 1941 the amount of \$9,094.94, or an aggregate amount of \$36,379.76. Respondent, in his deficiency notices to petitioners, attributed one-half of this latter amount, or \$18,189.88, to each of the petitioners. In explanation of this determination respondent stated:

Income reported in the aggregate amount of \$36,379.76 in the fiduciary returns filed for the alleged Ronald Quon, Jeannette Quon, Alberta Pauline Quon and Lillian Mae Quon trusts, purportedly established for your four minor children, by you and your spouse, as so-called co-trustors, is includible in your income to the extent of \$18,189.88 under the provisions of sections 22(a), 166 and 167 of the Internal Revenue Code.

OPINION

The instant situation is, in our opinion, controlled by *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293. We have here a situation wherein a sole proprietorship originated, operated, and controlled by petitioners is converted into a partnership which purports, by trust mediums, to include as limited partners petitioners' minor children. No capital not originating with petitioners has been contributed to the partnership by the trusts. No services are contributed to the partnership by the trustees. The business for all prac-

tical purposes continues to be operated and controlled after the conversion to the partnership form as before.

The only conceivable element in this case which could possibly be considered as excepting the instant situation from the familiar family partnership pattern is petitioner's claimed business purpose in making the trust [35] and partnership arrangement to avoid the freezing of assets. Petitioners stress this aspect of the case but it does not, in our opinion, serve to validate the attempted partnership for income tax purposes. It is true and we have so found that petitioner was partially motivated by a desire to avoid the freezing of his business assets. It is also true and we also found that petitioner was partially motivated by a desire to make provision for the security of his children and by a desire to reduce taxes. Furthermore, while the desire to avoid the freezing of assets by transferring ownership to citizens is, in one sense, a business purpose, it is not the kind of business purpose, in our judgment, which is indicative of the essential intent to really and truly join together for the purpose of carrying on business as partners. The desire to avoid the freezing of assets in fact indicates that the arrangement was intended merely as a technical shifting of title from alien to citizen. The purported limited partners in a sense constituted mere depositories of title for purposes other than those connoting a true partnership. We therefore conclude that this aspect of the case fails to remove it from the ambit of the *Tower* and *Lusthaus* rationale.

We hold that respondent correctly attributed the income of the trusts equally to petitioners.

Entered March 28, 1947.

Decisions will be entered for respondent. [36]

The Tax Court of the United States
Washington

Docket No. 5805

LILY HO QUON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered March 28, 1947, it is

Ordered and Decided: That there is a deficiency in income tax of \$9,835.08 for the year 1941.

Entered March 31, 1947.

/s/ SAMUEL B. HILL,
Judge. [37]

The Tax Court of the United States
Washington

Docket No. 5806

ALBERT T. QUON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered March 28, 1947, it is

Ordered and Decided: That there is a deficiency in income tax of \$9,835.08 for the year 1941.

Entered March 31, 1947.

/s/ SAMUEL B. HILL,
Judge. [38]

In the United States Circuit Court of Appeals
for the Ninth Circuit

T.C. Dockets Nos. 5805 and 5806

LILY HO QUON and ALBERT T. QUON,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Lily Ho Quon and Albert T. Quon, petitioners, by George T. Altman, counsel, hereby file their petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decisions by The Tax Court of the United States entered on March 31, 1947, determining deficiencies in the federal income taxes of each of petitioners for the calendar year 1941 in the amount of \$9,835.08, and respectfully show:

I.

Jurisdiction

The petitioners are individuals residing at 1051 South Gramercy Place, Los Angeles, California. The jurisdiction of this court is invoked under section 1141 of the Internal Revenue Code.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioners' liability for federal income taxes for the calendar year 1941.

Petitioners are husband and wife. Petitioner Albert T. Quon is a resident alien. Petitioner Lily Ho Quon is a citizen. They [39] have, and had during the year 1941, four minor children, all of whom were citizens.

Prior to May 1941 petitioners owned as community property a business operated as a sole proprietorship under the name of Quon-Quon Company. The business involved importing Chinese decorative merchandise and wholesaling it. On May 1, 1941, petitioners as co-trustors created four separate trusts, one for each of said children. Concurrently with the creation of these trusts, Quon-Quon Company was reorganized as a partnership, petitioners being constituted general partners and the trustees of the four trusts being constituted limited partners.

The sole question is whether the shares of the earnings of said Quon-Quon Company belonging to said partners under the partnership agreement were taxable to petitioners under the income tax provisions of the Internal Revenue Code. Petitioners contend that they were not.

III.

Scope of Review

The findings of fact of the Tax Court, except for any general statements contained therein which are inconsistent with specific findings of fact, are accepted by petitioners for the purpose of this review. Petitioners, however, being aggrieved by the opinion and conclusions of law of the Tax Court and by its decisions entered pursuant thereto desire to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ GEORGE T. ALTMAN,

Counsel for Petitioners. [40]

State of California,

County of Los Angeles—ss.

George T. Altman, being first duly sworn, says that he is counsel of record in the above-named causes; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

/s/ GEORGE T. ALTMAN.

Subscribed and sworn to before me this 9th day of April, 1947.

[Seal] /s/ BEN H. RUDNICK,

Notary Public in and for said County and State.

Received and filed T.C.U.S. April 14, 1947. [41]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Now come the petitioners herein by their attorney, George T. Altham, and hereby assert the following errors which they intend to urge on review by the United States Circuit Court of Appeals for the Ninth Circuit of the decisions of The Tax Court of the United States rendered in the above causes on March 31, 1947:

1. The Tax Court erred in concluding that the case is controlled by *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293.

2. The Tax Court erred in entering its decision in each of the dockets included in this proceeding wherein it ordered and decided in each such docket that there is a deficiency in income tax of \$9,835.08 for the year 1941.

/s/ GEORGE T. ALTMAN,
Counsel for Petitioners.

Filed T.C.U.S. April 14, 1947. [42]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the petitioners, on

[Title of Circuit Court of Appeals and Cause.]

the 14th day of April, 1947, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decisions of The Tax Court of the United States heretofore rendered in the above-entitled causes. Copies of the Petition for Review and Statement of Points as filed are hereto attached and served upon you.

Dated at Los Angeles, California, this 9th day of April, 1947.

Respectfully,

/s/ GEORGE T. ALTMAN,
Counsel for Petitioners.

Personal service of the foregoing notice, together with copies of the Petition for Review and Statement of Points mentioned therein, is hereby acknowledged this 15th day of April, 1947.

/s/ J. P. WENCHEL, C.A.R.
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Filed T.C.U.S. April 15, 1947. [43]

The Tax Court of the United States

Dockets Nos. 5805 and 5806

LILY HO QUON and ALBERT T. QUON,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of The Tax Court of the United
States:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above entitled causes in connection with the petition for review heretofore filed by the petitioners:

1. The docket entries of all proceedings before the Tax Court.
2. Pleadings before the Tax Court, as follows:
 - (a) Petition in Docket No. 5806.
 - (b) Answer in Docket No. 5806.
3. The findings of fact and opinion of the Tax Court.
4. The decisions of the Tax Court.
5. The petition for review.
6. This designation of contents of record on review. The pleadings in Docket No. 5805 are omitted for the reason that they are identical in all material

respects, except as to name of petitioner, with the pleadings in Docket No. 5806. Inclusion of the pleadings in Docket No. 5805 would in consequence constitute mere duplication.

/s/ GEORGE T. ALTMAN,
Attorney for Petitioners. [44]

Personal service of a copy of the foregoing designation is hereby acknowledged as having been made this 15th day of April, 1947.

/s/ J. P. WENCHEL, C.A.R.
Chief Counsel,
Bureau of Internal Revenue.

Filed April 15, 1947. [45]

[Title of Tax Court and Causes.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 45, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 29th day of April, 1947.

[Seal] /s/ VICTOR S. MERSCH, EMT
Clerk, The Tax Court
of the United States.

[Endorsed]: No. 11626. United States Circuit Court of Appeals for the Ninth Circuit. Lily Ho Quon and Albert T. Quon, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed May 12, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11626

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILY HO QUON and ALBERT T. QUON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review Decisions of the Tax Court
of the United States

OPENING BRIEF FOR PETITIONERS.

GEORGE T. ALTMAN,

215 West Seventh Street. Los Angeles 14.

Attorney for Petitioners.

FILED

JUL - 7 1947

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No. 11626

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILY HO QUON and ALBERT T. QUON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONERS.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1141 of the Internal Revenue Code. This appeal is from decisions of the Tax Court of the United States determining deficiencies in federal income taxes of each of the petitioners for the calendar year 1941. The petitioners are individuals residing in Los Angeles, California [R. 32].

Question Presented.

The sole question presented is whether the distributive shares of four trusts in the earnings of a certain business, the Quon-Quon Company, are includible in the gross income of petitioners under the income tax provisions of the Internal Revenue Code.

Statutory Provisions Involved.

The decision of the Court below was rested solely on *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293. The statutory provisions involved here are the same as involved in those cases. They are Sections 11, 12, 22(a), 181 and 182 of the Internal Revenue Code. Those provisions are shown in the appendix hereto, pages 1 and 2.

Statement of Facts.

1. Petitioners are husband and wife residing in Los Angeles, California. Unless otherwise indicated, the term "petitioner," in the singular, will be used herein to refer to Albert T. Quon. Petitioner is a resident alien. Petitioner Lily Ho Quon is a citizen. Prior to May, 1941, petitioners owned, as community property [R. 38], a business operated as a sole proprietorship of petitioner under the name of Quon-Quon Company. The business involved importing Chinese decorative merchandise and wholesaling it [R. 32].

2. On May 1, 1941, petitioners, as co-trustors, created four separate trusts, one for each of their four minor children. These children were all citizens. Concurrently with the creation of these trusts Quon-Quon Company was reorganized as a partnership, petitioners being constituted general partners and the trustees of the four trusts being constituted limited partners [R. 32].

THE TRUSTS.

3. The four trusts, in so far as here material, are essentially similar except for the identity of the beneficiaries and trustees [R. 32]. Petitioners, as co-trustors, irrevocably assigned to each trustee a 12½% interest in

the said Quon-Quon Company [R. 32]. Under his respective trust instrument each trustee was required to invest such 12½% interest as limited partner in the limited partnership into which, as above stated, the Quon-Quon Company was then reorganized. It was also required that his corresponding share of the profits be credited to him and “distributed to him from time to time, pro rata with distribution to the general partners” [R. 33].

4. Each trustee was “vested with power,” upon dissolution of said partnership, “to reinvest his distributive share of the proceeds therefrom, or any part thereof, in the capital assets or capital stock of any partnership, corporation or other company which may be organized for the purpose of acquiring the assets and continuing the operation of said business” [R. 33]. There is no provision requiring him so to reinvest his distributive share of the proceeds of dissolution, or any part thereof.

5. Each trustee was further authorized “to sell or exchange trust assets, purchase other assets, invest trust funds or borrow money and obligate or encumber the trust estate therefor, all only with the written consent of the beneficiary after he attains 21 years of age or only with the written consent of the beneficiary’s parents prior to such time” [R. 34].

6. Payments to the beneficiary of each trust out of accumulated income and principal of the trust estate were to begin when such beneficiary reached 21 and distribution of the entire income and principal was to be completed when he reached 35. If a beneficiary died before reaching 21 the trust estate was to go to *his* issue, or, if none, equally to the remaining trusts. If he died after reaching 21, the trust estate was to go to *his* heirs, devisees or legatees [R. 34]. There is no other provision for the

beneficial use of either the income or the principal of the trust estate. The trustors reserved no interest of any kind.

7. Each trustee was entitled to compensation for ordinary and usual services of \$50 a year. In the event of his absence from the state for an extended period of time a co-trustee could be appointed by a *competent court* to act during such period of absence. If a trustee resigned only a *competent court* could appoint a successor [R. 35].

THE PARTNERSHIP.

8. In the limited partnership into which the Quon-Quon Company was reorganized the petitioners became general partners, each with a 25% interest, and the four trustees of the four trusts became limited partners, each with a 12½% interest.

9. The partnership is for a term of 25 years. It can be dissolved by the death of a general or limited partner, or by the "withdrawal from the partnership of any general or limited partner" [R. 35]. Upon such dissolution of the partnership and the liquidation of its assets the pro rata shares of the limited partners in the assets of the partnership are to be returned to them [R. 36].*

*The findings show no limitation on the right of any general or limited partner to withdraw, although the copy of the partnership agreement set forth in the pleadings [R. 24] states that two months' written notice to the remaining general and limited partners is required. If the certificate of co-partnership does not otherwise specify, six months' notice is required. California Civil Code, Section 2492(2)(c).

EVENTS LEADING UP TO FORMATION.

10. In 1940 petitioner went to China to purchase merchandise for the business and was absent from this country approximately from April to August, inclusive, or about five months. During this period an employee named Fung "was in control of the business and operated it" [R. 36].

11. After petitioner returned from China in August, 1940, he became "concerned over the possibility that his business assets might be frozen by executive order since certain alien property in this country was becoming subject to such controls. Early in 1941 petitioner discussed the problem with various friends and advisors. The plan to create the trusts and the partnership, which was executed May 1, 1941, grew out of these discussions" [R. 36]. Since petitioner's children and wife were citizens, partial ownership of the business assets by them was considered a practical method of avoiding seizure to such extent [R. 37]. An additional factor considered in arriving at the plan was petitioner's parental desire to make provision for the security of his children. Another was reduction of taxes [R. 36-37].

CONDUCT OF BUSINESS AFTER FORMATION.

12. After the creation of the partnership the manner of conducting the business was the same as prior to the partnership [R. 37]. Thus, as in 1940, petitioner purchased merchandise for the business; and during his absences in that connection an employee such as the one

named Fung was in control of the business and operated it.*

13. After the creation of the partnership, however, there was a vital change in the residence of the power over the business. Thereafter any one of the trustees could withdraw his interest and thereby cause a dissolution of the partnership and liquidation and distribution of its assets [R. 35, 36. See also paragraph 9 above].

14. After the creation of the partnership, moreover, there were vital changes in the control and application of the earnings of the business. Petitioner received a salary from the partnership of \$4,000 for the eight-month period from May 1 to December 31, 1941, or \$500 per month. This was deducted in arriving at the net profits of the partnership [R. 37-38]. Petitioner could not draw against his share of the net profits without making pro rata distributions to the four trusts [R. 33]. Such distributions were made. At first such distributions to the trusts were made by purchase of securities for them and delivery thereof to the trustees. Later the trustees themselves directly purchased securities for the trusts from their distributive shares of net profit credited to them on the partnership books [R. 37].

*While the findings make no mention thereof, this Court will undoubtedly interpret the findings in the light of the substantial closure after 1940 of China to import trade, and the necessary diversion of importation trips thereafter to such foreign countries as remained effectively open.

Specification of Errors.

1. The Tax Court erred in holding that this case falls within the scope of *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293. The Tax Court rested its opinion solely on those cases. But the rationale of those cases has no application to the facts here.

2. The Tax Court erred in entering its decision in each of the dockets included in this proceeding wherein it ordered and decided in each such docket that there is a deficiency in income tax of \$9,835.08 for the year 1941.

Summary of Argument.

Under the Internal Revenue Code the net income of an individual who is a partner is expressly required to include his distributive share of the net income of the partnership. Therefore, the distributive share of each trust in the net income of the Quon-Quon Company was taxable to it and not to petitioners.

The exception of certain partnership interests created by intra-family gift from the scope of this statutory requirement under the doctrine of the *Tower* and *Lusthaus* cases has no application here. In those cases there was, in the guise of a partnership, a mere paper reallocation of income between husband and wife. Here the change was in economic realities. The trusts became the absolute owners of the partnership shares which they acquired and the recipients of the economic benefits flowing therefrom.

A. By Express Statutory Provision the Distributive Share of Each Trust as Limited Partner in the Net Income of the Quon-Quon Company Was Taxable to Such Trust and Not to Petitioners.

As shown in the appendix, page 2, Section 182 of the Internal Revenue Code expressly provides that the net income of a partner shall include, whether or not distribution is made to him, his distributive share of the net income of the partnership. It must follow that that distributive share of each trust involved here in the net income of Quon-Quon Company was taxable to such trust and not to petitioners.

B. Exception From the Above Statutory Provision, of Partnerships Constituting a Mere Paper Re-allocation of Income, Has No Application Here.

This exception is the product of the cases of *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293. In the *Tower* case the taxpayer, sole owner of a corporation except for a 1% interest in his wife and a 10% interest in one Amadon, transferred another 38% to his wife, retaining the balance of 51%, and then converted the corporation into a partnership. The question was whether the income attributable to the wife's share under the partnership agreement was taxable to her husband. The reason for forming the partnership was that it "would result in tax savings and eliminate the necessity of filing the various corporate returns." The partnership was to last for twenty years unless sooner terminated by a decision of a majority in interest of the partnership capital. As stated above, the husband held 51%. No salary was paid to the husband before determining the amount of the profits to be distributed. In

fact, Amadon's share of the profits was adjusted so as indirectly to preserve Amadon's previous salary and at the same time throw the amount previously paid the taxpayer as salary into the portion of the profits to be shared between the taxpayer and his wife. The wife's share of the earnings, the Supreme Court held, was "income produced by the husband's efforts." The Court also stated:

"The wife drew on income which the partnership books attributed to her only for the purposes of buying and paying for the type of things she had bought for herself, home and family before the partnership was formed. Consequently the result of the partnership was a mere paper reallocation of income among the family members. The actualities of their relation to the income did not change."

In the *Lusthaus* case a husband-wife partnership was likewise involved. There also the question was whether the income attributable to the wife's share under the partnership agreement was taxable to her husband. There the purpose was also entirely to reduce income taxes. There likewise the wife could not withdraw her interest without her husband's consent. There also the husband drew no salary. There, too, the wife's withdrawals of earnings were not used or held for her separate benefit. They were used largely to pay back some of the notes given by her to her husband in part payment of the purchase price of her alleged contribution to the partnership capital.

In these cases the Supreme Court, by way of illustration, pointed out factors which the Tax Court *could* properly take into consideration in determining that a partnership was real for tax purposes. But in neither one did it lay down conditions which *must* appear in order that a

partnership be considered real for tax purposes. The Supreme Court laid down no categorical imperatives. The issue was one between reality and fiction. Reality cannot be cast into any fixed and narrow mold. The Supreme Court made no attempt to do so.

Comparing now the *Tower* and *Lusthaus* cases with the case at bar, those cases are seen to be distinguishable in every material factor. The distinctions are as follows:

1. In the *Tower* and *Lusthaus* cases the income involved was the distributive share of the wife. Here it is the distributive shares of trusts for minor children. What husband and wife may do with their money as between themselves is entirely a matter between themselves. What parents may do with the property of their children is a wholly different matter.

In *Cushman v. Commissioner* (C. C. A. 2), 153 F. (2d) 510, the question involved taxability to the grantor of the income of a trust in which the beneficiaries were the grantor's children. The Court there, distinguishing *Helvering v. Clifford*, 309 U. S. 331, in which the beneficiary was the grantor's wife, stated that the particular relationship of the beneficiary to the grantor is important in determining whether "the grantor has retained the economic benefits of the property transferred in trust."

In California a parent as such has no control by operation of law over the property of the child. Civil Code of California, Section 202. If he is made guardian he is liable as trustee and is subject to regulation and control by the Court. Probate Code of California, Section 1400. If under a trust instrument he holds a power for the benefit of the trust he, as any one else, is with respect to the exercise of such power liable as trustee; and the express trustee may reject his attempted exercise of such

power in violation of the fiduciary relation. American Law Institute, Restatement of Trusts, Section 185; *Cushman, Jr., v. Commissioner, supra*.

Here, then, the income involved was in a wholly different position from that involved in the *Tower* and *Lusthaus* cases. Here it was not that of a wife, which might be subject to the husband's command. Here it was that of minor children, protected by trustees, a separate trustee for each child, and protected further by the special solicitude of the law. The exclusion of this income from the parent's dominion could not be greater if it were owned by total strangers.

2. In the *Tower* and *Lusthaus* cases the sole purpose was tax saving. Here the originating and primary purpose was protection of the business from destruction by freezing orders. The Tax Court found this as a fact. It made no finding that the transfers of interest were a sham, or that they were not *bona fide* and valid. On the contrary, it found as a fact that the petitioners, as co-trustors, "created four separate trusts," and "irrevocably assigned" the interests involved to the respective trustees. It found as a fact that concurrently "with the creation of these trusts Quon-Quon Company was reorganized as a partnership, petitioners being constituted general partners and the trustees of the four trusts being constituted limited partners." It found as a fact that the partnership could be dissolved by the "withdrawal from the partnership of any general or limited partner." It found as a fact that the distributive share of each trustee in the net income of the partnership was required to be distributed to him "pro rata with distribution to the general partners." It found as a fact that such distributions were actually made and that the amounts of such distributions were invested

by the trustees in securities. Every finding bears out and emphasizes the utter honesty and completeness of the transfer of partnership interests to the trusts. Is this any the less significant because the purpose was to protect the business involved from destruction? That purpose, on the contrary, explains the thoroughness and completeness with which the change was carried out. There is no method whereby petitioners could retake the partnership interests which they transferred, or distribute to themselves, or for their use or benefit, the shares of the trusts in the partnership income, as long as either the trustees do their duty or there are courts in this land.

3. In the *Tower* and *Lusthaus* cases the partnership could not be terminated without the consent of the donor partner. Here any of the trustees could by withdrawing his interest terminate the partnership.

That a power of withdrawal is proof of real ownership is shown in *Ralph W. Conant v. Com.*, 7 T. C. 577. In that case, the taxpayer created four trusts of each of which his wife was primary beneficiary. She was given the absolute power to cancel the trusts at any time and take over their corpus and undistributed income. The Court held there that that power of withdrawal prevented taxability of the income to the trustor.

4. In the *Tower* and *Lusthaus* cases the donor partner received no salary for his services to the partnership before determination of earnings divisible among the partners. Here the donor partner, petitioner, was paid for his services and such payment was deducted in arriving at the net profit divisible among the partners. The services of petitioner are therefore excluded as a factor in the case here. *John E. Goerlich v. Commissioner*, memorandum

decision of the Tax Court, Jan. 22, 1947, C. C. H. Decision No. 15,583(M).

5. In the *Tower* and *Lusthaus* cases the distributions of earnings to the donee partner, the wife, were not used or held for her separate benefit. In the *Tower* case they were used for the purposes of buying and paying for the type of things she had bought for herself, home and family before the partnership was formed. In the *Lusthaus* case they were used to pay her husband on the notes given by her as part payment of the purchase price of her alleged contribution to the partnership capital. Here, however, the distributions to the trusts were invested in securities by the trustees and accumulated for the respective beneficiaries.

C. The Decisions of the Tax Court Here Are in Direct Conflict with *U. S. v. Morss* (C. C. A. 1), 159 F. (2d) 142, Decided January 14, 1947, and *Thomas v. Feldman* (C. C. A. 5), 158 F. (2d) 488, Decided November 22, 1946.

In the *Morss* case the settlor created four trusts, one for each of four minor children, all substantially identical as to terms and form. The settlor and his wife were co-trustees. The trusts were irrevocable, with no power reserved to alter or amend. The settlor and his wife, however, as co-trustees had every conceivable power, including the power to invest the trust funds in any partnership in which the settlor-trustee was interested as partner. Still the Court held that the income of the trusts was not taxable to the settlor-trustee.

In the *Feldman* case the taxpayers, as here, were husband and wife holding their property as community property. They reorganized two businesses as limited partner-

ships, with taxpayer J. Feldman as general partner and a trust for the benefit of their children as limited partner. There, as here, the limited partnership interests were created by gift from the taxpayers. On the finding that the gifts creating the trusts were “*bona fide*, valid and irrevocable,” that the donors ceased to be “the beneficial owners of the trust property or the recipients of the income therefrom,” and that none of the income or corpus of the trust was used for their “personal benefit or economic gain,” the partnership income allocated to the trust was held not taxable to the donors.

While the Tax Court’s conclusion of law here was against the taxpayers its findings of fact were identical with those in the *Feldman* case, to the extent of the findings in that case. The case here, moreover, contains several additional elements which make the taxpayers’ position here even stronger. There is here a finding of business purpose; of power of the trustee of any of the trusts to terminate the partnership; of compensation paid petitioner as general partner for his services.

Clearly the decisions of the Tax Court here are in conflict with the *Morss* and *Feldman* cases.

Conclusion.

The case here is not within the ambit of the *Tower* and *Lusthaus* cases. The distributive shares of the trusts in the net income of the Quon-Quon Company should therefore be taxed to the trusts and not to petitioners.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

July 3, 1947.

APPENDIX.

Provisions of Internal Revenue Code Involved Herein.

“Sec. 11. NORMAL TAX ON INDIVIDUALS.

“There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 4 per centum of the amount of the net income in excess of the credits against net income provided in section 25.”

“Sec. 12. SURTAX ON INDIVIDUALS.

“(a) DEFINITION OF ‘SURTAX NET INCOME.’—As used in this section the term ‘surtax net income’ means the amount of the net income in excess of the credits against net income provided in section 25(b).

“(b) RATES OF SURTAX.—There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual the surtax shown in the following table:”

.

“Sec. 22. GROSS INCOME.

“(a) GENERAL DEFINITION.—‘Gross income’ includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property;”

.

“Sec. 181. PARTNERSHIP NOT TAXABLE.

“Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.”

“Sec. 182. TAX OF PARTNERS.

“In computing the net income of each partner, he shall include, whether or not distribution is made to him—”

.

“(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership. . . .”

No. 11,626

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

LILY HO QUON AND ALBERT T. QUON, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON L. CAUDLE,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,

FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

FILED

AUG 23 1947

PAUL P. O'BRIEN,
CLERK

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*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only opinion in this case is the unreported memorandum findings of fact and opinion of the Tax Court entered March 28, 1947. (R. 31-40.)

JURISDICTION

This is an appeal by Albert T. Quon and his wife, Lily Ho Quon, both residents of the State of California, from separate decisions of the Tax Court of the United States redetermining a deficiency in federal income tax against each petitioner for the year 1941 in the sum of \$9,835.08. (R. 31, 40, 41.)

The taxpayer and his wife filed separate income tax returns for the year 1941 with the Collector of Internal Revenue for the sixth district of California at

Los Angeles on a community property basis. (R. 31.) Under date of May 27, 1944, the Commissioner of Internal Revenue, pursuant to Section 272 (a) of the Internal Revenue Code, mailed statutory notices to the petitioners proposing to assess against each a deficiency for the year 1941 in the sum of \$9,835.08. (R. 11-15.)¹ Within the time allowed therefor, the taxpayers petitioned the Tax Court for redetermination of the deficiencies asserted against them. (R. 2, 4, 7-11.) The Commissioner duly answered (R. 2, 4, 30-31), and the Tax Court, after hearing in due course (R. 2-3, 5), entered its decision on March 31, 1947, affirming the determination of the Commissioner (R. 40, 41). The proceeding is brought to this court by a joint petition for review filed with the Clerk of the Tax Court on April 14, 1947 (R. 42-46), pursuant to Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether under the facts found by the Tax Court the petitioners, husband and wife residing in the State of California, are taxable proportionately under Section 22 (a) of the Internal Revenue Code upon the distributive share of partnership income distributable to the trustees of four separate trusts set up by the petitioners, as grantors, for the benefit of their four

¹ The cases were consolidated for hearing before the Tax Court. (R. 2-3, 5, 31.) They are before this Court on a joint petition for review (R. 42-45) and a consolidated record on review, from which has been omitted such portions of the record before the Tax Court in the case of Mrs. Quon as would represent a duplication of the record in the case of Albert T. Quon, except as to the name of the petitioner (R. 47-48).

minor children, out of one-half of the assets of an alleged family partnership, the business of which previously was conducted as a sole proprietorship.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*.

STATEMENT

The petitioners are husband and wife residing in Los Angeles, California.² The husband, Albert T. Quon, is a resident alien. His wife, Lily Ho Quon, is a citizen. Prior to May, 1941, the husband, as sole proprietor, operated a business under the name of Quon-Quon Company. The business involved importing Chinese decorative merchandise and wholesaling it. (R. 32.)

On May 1, 1941, the taxpayers, as co-trustors, created four separate trusts, one for each of their four children, then ranging in age from ten to four years, respectively. The children are all citizens. Concurrently with the creation of these trusts Quon-Quon Company was reorganized as a partnership, the taxpayers being constituted general partners and the trustees of the four trusts being constituted limited partners. (R. 32.)

Each of the four trusts, to the extent they are material here, are essentially similar except for the identity of the beneficiaries and the trustees. The trust for a daughter, Lillian Mae, born August 1, 1932,

² The husband, Albert T. Quon, is sometimes referred to herein as the taxpayer, while both are sometimes referred to jointly as the taxpayers.

may be considered as typical of all of the trusts.³ This trust indenture (R. 15-22) recites that Albert T. Quon "owns and operates" Quon-Quon Company, which business was community or joint property of the taxpayers, and that they desired to make provision and settlement for their daughter by irrevocable transfer, in trust, of an interest in such business (R. 15). The taxpayers, as co-trustors, thereupon assigned to Lillian Mae's trustee an undivided 12½ percent interest in the business of Quon-Quon Company, subject to the terms of the partnership hereafter described. The trust instrument provides that (R. 16):

1. Concurrently with the execution of this indenture, said business shall be reorganized as a limited partnership and Trustee shall become a limited partner therein. As such limited partner and as Trustee under this Trust Agreement, he shall have a twelve and one-half percent (12½%) interest in said business and shall be entitled to receive twelve and one-half percent (12½%) of the net profits therefrom and said share of the profits shall be credited to the Trustee and distributed to him from time to time, pro rata with distribution to the general partners in said business.

2. Trustors shall be general partners in said limited partnership. Said limited partnership

³ The Tax Court referred to the pertinent provisions of the trust for their son, Ronald, as typical of the material provisions of all of the trusts. (R. 32-35.) The corresponding provisions of the trust for Lillian Mae are referred to herein as being typical because it is printed in the record (pp. 15-22) as an exhibit attached to the petition filed with the Tax Court in the case of Albert T. Quon.

shall continue for twenty-five (25) years unless sooner terminated by the death, withdrawal or transfer of interest of one of the general or limited partners.

Under the indenture the trustee is vested with power (R. 17) :

a. Upon termination, dissolution or reorganization of said limited partnership, to reinvest his distributive share of the proceeds therefrom, or any part thereof, in the capital assets or capital stock of any partnership, corporation or other company which may be organized for the purpose of acquiring the assets and continuing the operation of said business.

Under the indenture the trustee is further authorized to sell or exchange trust assets, purchase other assets, invest trust funds or borrow money and obligate or encumber the trust estate therefor, but all only with the written consent of the beneficiary after she attains 21 years of age, or only with the written consent of the parents or legal guardian of the beneficiary prior to that time. (R. 17.)

The trust instrument further provides that when the beneficiary, Lillian Mae, reaches the age of 21 years, the trustee shall thereafter pay her from the income or principal, or both, of the trust estate such amount as in the trustee's discretion is necessary to maintain the standard of living to which she has been theretofore accustomed, if her parents or surviving parent is not ready, willing, and able to provide such funds for her. (R. 18.)

The trust instrument further provides that when the beneficiary reaches the ages of 21, 25 and 30 years the

trustee shall pay her, respectively, one-fourth, one-third, and one-half of the then accumulated income and principal of the trust estate other than the partnership interest in Quon-Quon Company. When she reaches the age of 35 years the trustees are to pay her the entire remainder of the estate and the trust will terminate. If she should die before attaining the age of 21 years, the trust estate is to go to her issue or, if none, equally to the remaining trusts. If she dies after reaching the age of 21 years, the trust estate is to go to her heirs, devisees, or legatees. (R. 18-19.)

Finally, the trustee is entitled to compensation for ordinary and usual services in the amount of \$50 per year and such additional compensation for extraordinary services as a court of competent jurisdiction may award. If the trustee is to be absent from the State of California for an extended period of time, a co-trustee may be appointed by a court of competent jurisdiction to act during such period of absence. If the trustee resigns, a successor trustee must be appointed by a court of competent jurisdiction. (R. 20-21.)

Concurrently with the creation of the above trusts, Quon-Quon Company was reorganized into a purported partnership. The taxpayers were general partners, each having a 25 percent interest, and the four trustees of the four trusts were limited partners, each having a $12\frac{1}{2}$ percent interest in the partnership. Each general partner contributed to the partnership an undivided 25 percent interest in the business of Quon-Quon Company. Each limited partner contributed to the partnership an undivided $12\frac{1}{2}$

percent interest in the partnership business, each such 12½ percent interest being valued at \$11,268.06. (R. 35.)

The alleged partnership is for a term of 25 years. It can be dissolved by the death of a general or limited partner, the transfer or attempted transfer of the interest of any general or limited partner, the retirement or withdrawal from the partnership of any general or limited partner. The substitution of a successor trustee as a limited partner does not operate to dissolve the partnership. (R. 35.)

Among other things, the so-called partnership agreement provides (R. 26-27, 35-36):

VII.

Each limited partner and each of the general partners has agreed and does hereby agree to contribute to the partnership capital a pro rata amount, based on his or her respective interest in said partnership assets and profits, only out of his or her share of the net profits from said business, sufficient in the aggregate to pay all obligations of said business heretofore or hereafter incurred and to provide adequate working capital.

VIII.

No definite time has been agreed upon for the return of the contributions of the limited partners. Their pro rata shares of the capital assets of the partnership shall be returned to them, concurrently and pro rata with distribution to the general partners, upon termination of the partnership and liquidation of its assets.

As early as 1939 the taxpayer discussed the advisability of creating trusts for his children but nothing was then done. In 1940 he went to China to purchase merchandise for the business and was absent from this country approximately from April to August, inclusive. During this period an employee named Fung was in control of the business and operated it. After the taxpayer returned from China in August 1940, he became concerned over the possibility that his business assets might be frozen by executive order since certain alien property in this country was becoming subject to such controls. Early in 1941 the taxpayer discussed the problem with various friends and advisors. The plan to create the trusts and the partnership, which was executed May 1, 1941, grew out of these discussions and was prompted by various considerations. One consideration was the taxpayer's parental desire to make provision for the security of his children. Another consideration was the fear of having the assets of his business frozen by the Government, and since his children and wife were citizens partial ownership of the business assets by them was considered a practical method of avoiding seizure to that extent. Another consideration was the reduction of taxes. (R. 36-37.)

After creation of the so-called partnership, the business of Quon-Quon Company continued to be conducted in all material respects in the same manner as it had been conducted prior to the partnership. The limited partners played no part in the conduct of the business. Capital and drawing accounts were set up on the partnership books for each limited partner.

To each limited partner's capital account was credited 12½ percent of the partnership's net profit. Checks were drawn from time to time by the taxpayer on the partnership's commercial account, payable to various banks and brokers, which checks were ratably charged against the limited partners' drawing account. These checks were drawn to purchase securities which were delivered by the taxpayer to the trustees. Later the trustees themselves directly purchased securities for the trusts from the amounts credited to them on the partnership books. These purchases were approved by the taxpayers as parents of the beneficiaries. (R: 37.)

On the taxpayers' income tax returns for 1941 the income of Quon-Quon Company from January 1, 1941, to April 30, 1941, inclusive—the period prior to formation of the so-called partnership—was shown in the amount of \$40,580.19, which amount included the husband's salary of \$4,000 from the partnership for the eight month period, May to December, inclusive. This amount was also reported on a community property basis. Each trust reported as its share of the partnership income for 1941 the amount of \$9,094.94, or an aggregate amount of \$36,379.76, for the four trusts. In determining the deficiencies here involved the Commissioner added one-half of this latter amount, or \$18,189.88, to the income of each of the taxpayers. (R. 37–38). In explaining his determination the Commissioner stated (R. 13–14, 38):

Income reported in the aggregate amount of \$36,379.76 in the fiduciary returns filed for the alleged Ronald Quon, Jeanette Quon, Alberta

Pauline Quon and Lillian Mae Quon trusts, purportedly established for your four minor children by you and your spouse, as so-called co-trustors, is includible in your income to the extent of the \$18,189.88 under the provisions of section 22 (a), 166 and 167 of the Internal Revenue Code.

On the basis of the foregoing facts the Tax Court affirmed the determination of the Commissioner (R. 38-41), and the taxpayers have petitioned this Court for a review of the decisions of the Tax Court. (R. 42-45.)

SUMMARY OF ARGUMENT

Partnerships are not separately taxable for federal income tax purposes. Instead, the members thereof are taxable in their individual capacity upon their distributive share of the partnership income, whether distributed or not. However, a mere written agreement among members of a family which has as its principal objective or accomplishment the division of family income for purposes of reducing taxes is not a valid partnership for federal income tax purposes. Such a partnership must have a genuine business purpose. The act of transferring to other members of the family, as here, by trust or otherwise, a substantial interest in a business theretofore conducted as a sole proprietorship, merely to protect the assets from possible seizure by the Government, does not constitute a valid business partnership for income tax purposes. The fact that such interest was transferred to trustees under irrevocable trusts for the benefit of minor children is immaterial.

Whether a so-called family partnership is a valid partnership for income tax purposes is a question of fact to be determined from the evidence. Here the Tax Court has found that no valid partnership exists under the facts, and that finding is supported by the evidence. It is binding upon this Court.

ARGUMENT

The Tax Court did not err in holding under the facts that taxpayers are liable for tax upon that part of the income of Quon-Quon Company distributable or distributed to the trusts created for their minor children

The only question involved in this case is whether the Tax Court, under the facts set out above, correctly sustained the Commissioner's determination that income of Quon-Quon Company for the year 1941 in the sum of \$36,379.76, which had been reported in equal shares as income of the four trusts created by them on May 1, 1941, for the benefit of their four minor children, was taxable one-half to each of the taxpayers. We submit this question is fully answered by the recent decision of the Supreme Court in *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293, as well as by numerous decisions by the several Circuit Courts of Appeals, dealing principally with the status of so-called family partnerships for federal income tax purposes, and by other recent decisions of the Supreme Court, including *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied 321 U. S. 231, *Commissioner v. Scottish American Co.*, 323 U. S. 119, and *John Kelley Co. v. Commissioner*, 326 U. S. 521, dealing principally

with the authority of the appellate federal courts to review decisions of the Tax Court.

In this case the Commissioner added the income in question to the income reported by the taxpayers with the explanation that the income was includible in their returns under the provisions of Sections 22 (a), 166 and 167 of the Internal Revenue Code (Appendix, *infra*). (R. 13-14, 38.) In its opinion (R. 38-40), the Tax Court held the income taxable to the taxpayers under Section 22 (a) of the Internal Revenue Code, and did not pass upon the question of taxability under Sections 166 and 167.⁴

The taxpayers argue generally that the *Tower* and *Lusthaus* cases, *supra*, are distinguishable on their facts from the instant case (Br. 8-13), and that the decision here should be controlled by the decisions of the Circuit Court of Appeals for the First Circuit in *United States v. Morss*, 159 F. 2d 142, and of the Circuit Court of Appeals for the Fifth Circuit in *Thomas v. Feldman*, 158 F. 2d 488 (Br. 13-14). We submit there is no merit to either proposition.

In view of the decisions of the Supreme Court in *Commissioner v. Tower*, *supra*, and *Lusthaus v. Com-*

⁴ The Tax Court did not pass upon taxability of the income in question to the taxpayers under Section 22 (a) of the Code as construed and applied in *Helvering v. Clifford*, 309 U. S. 331. Under the circumstances, if the Court should be of the opinion that the alleged partnership here involved is a valid partnership for federal income tax purposes, it probably will want to remand the case to the Tax Court for determination of these pretermitted questions. Compare *Hopkins v. Commissioner*, 144 F. 2d 683 (C. C. A. 6th), on remand, *Hopkins v. Commissioner*, 5 T. C. 803, affirmed, 157 F. 2d 679 (C. C. A. 6th), certiorari denied, June 2, 1947. But see *Jones v. Norris*, 122 F. 2d 6 (C. C. A. 10th).

missioner, supra, and the myriad of other decisions by this Court and other federal courts, both before and since these Supreme Court decisions, dealing with abortive tax saving arrangements of this character,⁵ it would be an imposition upon this Court to discuss at length the fundamentals of partnership law or the history or principles of taxation of partnerships under the federal income tax statutes.⁶ Partnerships are not taxable as such for federal income tax purposes. Section 181 of the Internal Revenue Code (Appendix, *infra*). Instead, the individual members are taxable upon their distributive share of the partnership income, whether distributed or not. Section 182 of the Internal Revenue Code (Appendix, *infra*). However, the provisions of income tax statutes apply only to bona fide partnerships which have a genuine business purpose and the

⁵ See notes 1 and 2 of *Commissioner v. Tower, supra*, p. 280. The principles upon which the decisions in the *Tower* and *Lusthaus* cases, *supra*, are based are not limited to so-called family partnerships. They apply to cases involving the relationship of a sole stockholder to his corporation. While the relations between a corporation and its sole stockholder may not, for the reason that the stock is solely owned, be disregarded for tax purposes, transactions between them must, to be effective for tax purposes, have reality; must not be mere tax dodging devices without substance or business benefits. *Gregory v. Helvering*, 293 U. S. 465; *Griffiths v. Commissioner*, 308 U. S. 355; *Higgins v. Smith*, 308 U. S. 473. Nor can such a result be accomplished by the creation of a trust, the principal effect of which is a mere reallocation of the family income. *Helvering v. Clifford*, 309 U. S. 331.

⁶ The history of the provisions dealing with taxation of partnerships for federal income tax purposes is discussed at some length in *Neuberger v. Commissioner*, 311 U. S. 83; *Commissioner v. Lamont*, 156 F. 2d 800 (C. C. A. 2d); and *Craik v. United States*, 31 F. Supp. 132 (C. Cls.).

mere signing of a written agreement by members of a family, or, as here, by the parents and trustees representing trust estates created by the parents under the circumstances of this case for the benefit of their minor children, which has as its most apparent objective the division of family income, will not create a bona fide partnership for federal income tax purposes. As the Supreme Court said in *Commissioner v. Tower*, *supra*, pp. 286-287:⁷

A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses. When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their "agreement, considered as a whole, and by their conduct in execution of its provisions." *Drennen v. London Assurance Co.*, 113 U. S. 51, 56; *Cox v. Hickman*, 8 H. L. Cas. 268. * * *

The Supreme Court then pointed out (p. 287) that there is no reason why this general rule should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes. And

⁷ See, also, *Meehan v. Valentine*, 145 U. S. 611, 618; *Cohan v. Commissioner*, 39 F.2d 540 (C. C. A. 2d).

where, as here, the Tax Court, acting pursuant to its authority, has found from the evidence before it that the parties to the agreement did not intend to carry on business as a partnership, and this finding is supported by the evidence, it is final. *Dobson v. Commissioner, supra*. Furthermore, when the alleged partnership arrangement is among members of a family it is subject to particularly careful scrutiny. *Commissioner v. Tower, supra; Lusthaus v. Commissioner, supra*.

That the taxpayers and the parties designated as trustees of the trusts for the benefit of their four minor children did not really and truly intend to join together for the purpose of carrying on business is eminently clear from the terms of the partnership agreement (R. 22-28), the terms of the several trust agreements (R. 15-21), and from the facts found by the Tax Court (R. 32-38), none of which are controverted by the taxpayers. Prior to May 1, 1941, the business of Quon-Quon Company had been conducted by Albert T. Quon as a sole proprietorship. After that there was no change in the conduct of the business. No new capital was added which had originated with the new partners. No new services were performed for the business by any of the partners. The limited partners played no part in the conduct of the business.

The Tax Court found (R. 36-37) that the creation of the trusts for the benefit of the taxpayers' minor children, and the formation of the so-called partnership, was prompted by several considerations, none of which involved a genuine business purpose such as

would satisfy the requirements of the income tax statutes. One consideration was the desire of Albert T. Quon to make provision for the security of his children. Another consideration was his fear of having the business assets of Quon-Quon Company frozen by the Government because he was an alien, and it was thought that partial ownership of the business assets by his wife and children, who were citizens, provided a practical method of avoiding seizure to such extent. Another consideration was the reduction of taxes. (R. 36-37.)

As pointed out by the Tax Court in its opinion (R. 39), the only conceivable element in this case which possibly could be considered as excepting this case from the familiar family partnership pattern is the husband's claimed business purpose in making the trust and partnership arrangement to avoid the seizure of his business assets. The Tax Court properly held that this purpose did not serve to validate the partnership for income tax purposes; that while the desire to avoid the freezing of assets by transferring ownership to citizens is, in one sense, a business purpose, it is not the kind of business purpose (R. 39)—

which is indicative of the essential intent to really and truly join together for the purpose of carrying on business as partners. The desire to avoid the freezing of assets in fact indicates that the arrangement was intended merely as a technical shifting of title from alien to citizen. The purported limited partners in a sense constituted mere depositories of title for purposes other than those connoting a true partnership.

It should be noted that in adding one-half of the income reported by the several trusts to the income reported by Albert T. Quon and his wife, the Commissioner has not recognized the purported partnership as valid for income tax purposes, even as between husband and wife. The several trust agreements stated that the business of Quon-Quon Company was community property. (R. 15, 32.) In any event, the Commissioner has treated the income of the business as community income for tax purposes, one-half of which is taxable to each,⁸ and the taxpayers cannot complain of the Commissioner's action on this score. Furthermore, it is clear from the Tax Court's findings and opinion that the purported partnership is not valid, even as to the husband and wife, for income tax purposes.

This case cannot be distinguished in principle from the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Benson v. Commissioner*, 161 F. 2d 821, and *Belcher v. Commissioner*, decided July 2, 1947 (1947 P-H, par. 72,504), both of which involve similar family trust-partnership arrangements. In *Scherf v. Commissioner*, 161 F. 2d 495 (C. C. A. 5th), each of the two members of a partnership assigned to each of his two children as a gift a part of his interest in the partnership. This is an even stronger case from the taxpayer's standpoint, yet the Circuit Court of Appeals affirmed the decision of the Tax Court, holding that the new arrangement was not a valid partnership for purposes of the income tax.

⁸ Compare *Todd v. Commissioner*, 153 F. 2d 553 (C. C. A. 9th), now pending before this Court on a second appeal.

See, also, *Haldeman v. Commissioner*, 6 T. C. 345; *Pritchard v. Commissioner*, 7 T. C. 1128.

The taxpayers seek to distinguish their case from the *Tower* and *Lusthaus* cases, *supra*, on the grounds that (1) in those cases the income involved was the wife's distributive share of the partnership income while here it is the distributive share of the trusts created for the benefit of their minor children over which they, as grantors, have no control (Br. 10-11); (2) in the cited cases the sole purpose of the partnership arrangement was to save taxes while here the primary purpose was protection of the business from destruction by freezing orders (Br. 11-12); (3) in the cited cases the partnership could not be terminated without the consent of the donor, while here any of the trustees, by withdrawing, could terminate the partnership (Br. 12); (4) the donor partner in the cited cases received no salary from the partnership, while here Albert T. Quon was paid a salary for his services which was deducted in arriving at the distributive share of the partners (Br. 12-13); and (5) in the cited cases the distributed shares of the donee partner were not used for a separate benefit while a contrary situation exists here (Br. 13).

These claimed distinctions are without merit.

1. Cases are numerous in which it has been unsuccessfully contended that members of the family other than husband or wife should be taxed as a member of a family partnership. As illustrative, in addition to those cases cited above, see *Wilson v. Commissioner*, 161 F. 2d 556 (C. C. A. 4th); *Blalock v. Allen*, 151 F.

2d 927 (C. C. A. 5th); *Villere v. Commissioner*, 133 F. 2d 905 (C. C. A. 5th); *Tinkoff v. Commissioner*, 120 F. 2d 564 (C. C. A. 7th); *Saenger v. Commissioner*, 69 F. 2d 631 (C. C. A. 5th); *Cohan v. Commissioner*, 39 F. 2d 540 (C. C. A. 2d); *Dawes v. Allen*, 61 F. Supp. 284 (M. D. Ga.), affirmed without opinion, 157 F. 2d 518 (C. C. A. 5th); *Lang v. Commissioner*, 7 T. C. 6; *Harvey v. Commissioner*, 6 T. C. 653; *Lawton v. Commissioner*, 6 T. C. 1093 (on appeal, Circuit Court of Appeals for the Sixth Circuit).

From the foregoing and numerous other decisions, it is clear that the family relationship is not important.

2. The second alleged distinction already has been answered above. A purpose to prevent disruption or destruction of the business through seizure of the assets of the business by the Government is not the kind of a business purpose essential to the creation of a valid partnership for income tax purposes.

3. The injection of trusts for the benefit of the minor children, as is clear from some of the cases cited above, is not a valid distinction. It is immaterial for federal income tax purposes that the trusts, or the partnerships, or both, may be perfectly valid under state law. Nor is the right of the trusts to share in the partnership income, nor the limitation under state law. Nor is the right of the trusts to tates, determinative of the validity of the partnership for income tax purposes. The arrangement here involved is not recognized as a valid partnership for federal income tax purposes and therefore the income of the business is taxable in the first instance

to the taxpayers. *Lucas v. Earl*, 281 U. S. 111; *Poe v. Seaborn*, 282 U. S. 101; *United States v. Malcolm*, 282 U. S. 792; *Burnet v. Leininger*, 285 U. S. 136. In *Scherf v. Commissioner*, *supra*, pp. 497-498, the court pointed out that the *Tower* and *Lusthaus* cases, *supra*, merely apply to situations where the Tax Court has found that individuals are attempting through pseudo-partnerships to separate the earner from income for tax purposes; the rule of the above and other similar cases that the dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid.

4. We fail to see where the fact that Albert T. Quon received a salary from the business which was deducted before computing the distributive shares of the several trusts has any bearing upon the question at issue.⁹ The contrary would seem to be true if the parties had joined together for a real business purpose where they would share profits and losses as business associates.

5. From the case just cited it clearly is immaterial what the earner of the income has done with it after, he has received it or created the right to receive it. The arrangement here was essentially an assignment of future income, and the conditions imposed upon the donee in the use of that income, or the limitations upon the donor's future control over it, are entirely immaterial to the question involved here.

⁹ This salary would be taxable one-half to Albert T. Quon and one-half to the wife. *United States v. Malcolm*, *supra*.

As stated at the beginning of this argument, the two cases relied upon by the taxpayers (Br. 13-14) are not in print. *United States v. Morss*, 159 F. 2d 142 (C. C. A. 1st), cited by the taxpayers (Br. 13), involved the question of taxability to the grantor, under Section 22 (a) of the Internal Revenue Code, and the decision in *Helvering v. Clifford*, 309 U. S. 331, of the income of certain trusts which he had created for the benefit of his children. No such question is involved here unless it can be said that the purported partnership in this case is a valid one for income tax purposes. Until the alleged partnership can be established, the instant case involves only the question of taxation of the income of the taxpayer's business to its earner. No income of the trust, as such, is involved unless it can be held that the income of Quon-Quon Company is partnership income. We submit this cannot be done under the facts and the law.

Thomas v. Feldman, 158 F. 2d 488 (C. C. A. 5th), though cited by the taxpayers (Br. 13), carries its own distinction from the instant case by concluding (p. 489):

The distinction between this case and the three cases above mentioned is that here the trier of fact found in favor of the taxpayer and in all the others the facts were against the taxpayer.

For the same reason that case is inapplicable here because here the Tax Court found as a fact that there was no valid partnership including the trust estates created by the taxpayers for the benefit of their minor children. That finding is supported by the evidence and is binding here.

CONCLUSION

The decision of the Tax Court is right. It is supported by the facts and the law and should be affirmed.
Respectfully submitted,

THERON L. CAUDLE,
Assistant Attorney General.

SEWALL KEY,

A. F. PRESCOTT,

FRED E. YOUNGMAN,

Special Assistants to the Attorney General.

AUGUST 1947.

APPENDIX

INTERNAL REVENUE CODE

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, any income derived from any source whatever. * * * (26 U. S. C. 1940 ed., Sec. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (26 U. S. C. 1940 ed., Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called “charitable contribution” deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section the term “in the discretion of the grantor” means “in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question.”

* * * * *

(26 U. S. C. 1940 ed., Sec. 167.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1940 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

(26 U. S. C. 1940 ed., Sec. 182.)

No. 11626

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILY HO QUON and ALBERT T. QUON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review Decisions of the Tax Court
of the United States

REPLY BRIEF FOR PETITIONERS.

FILED

AUG 30 1947

PAUL P. D'BRIEN,

CLERK

GEORGE T. ALTMAN,

215 West Seventh Street, Los Angeles 14,

Attorney for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

I.

Respondent's Restatement of Facts Erroneously Conveys the Impression That the Tax Court Found as a Fact That the Partnership Was a Mere Sham.

Respondent, in restating the facts as found by the Tax Court, labels the partnership as "purported", "alleged", "so-called." (Br. 6, 7, 9.) Nowhere in the Tax Court's findings of fact is any one of those words used. To this extent respondent's statement may be adroit; but it is clearly misrepresentative.

The term "purported" is indeed used in the opinion; but the references made by the Tax Court to the partnership there are not even pretended to be findings of fact based upon evidence. The Tax Court there in speaking of

what it has found to be fact refers back to what is contained in its findings of fact; and its conclusions with respect to the partnership stated in its opinion are predicated expressly upon those findings of fact. The Court in no wise represents these conclusions as being such findings, but presents them on the contrary as conclusions following as a matter of law from its findings.

Thus, the Tax Court in its opinion [R. 39] refers to its finding of a purpose to avoid the freezing of assets, and then states that that purpose is not the proper kind in their judgment to indicate an "intent to really and truly join together for the purpose of carrying on business as partners." It is made no finding at all with respect to such intent. It only drew an opinion in regard to it as a matter of law from a fact clearly found, a fact uncontroverted in the record and now before this Court. *Commissioner v. Heininger*, 320 U. S. 467. There is no rule which requires this Court to close its eyes to the reasoning of the Court below.

II.

Respondent's Summary of Argument Erroneously Interprets a Question of Law to Be a Question of Fact.

Respondent in his summary of argument makes the same error as he did in restating the facts. He states there: "the Tax Court has found that no valid partnership exists under the facts and that finding is supported by the evidence." (Br. 11.) The Tax Court made no such finding. Nor could it. The facts being found, the question whether or not validity results is a question of law, not of fact.

III.

The Dobson Rule Is Inapplicable Here.

Respondent in his argument first attempts to apply the *Dobson* rule. (Br. 11.) That rule has no application here. As respondent himself points out, the facts found by the Tax Court have not been controverted by the taxpayers. (Br. 15.) The facts are therefore not in controversy and there is no issue of fact raised here. The only issues before this Court are the conclusions of law of the Tax Court stated in its opinion. Those conclusions are reviewable here. *Commissioner v. Heininger*, *supra*, decided on the same day as the *Dobson* case; *Crane v. Commissioner*, 15 U. S. Law Week 4455 (decided April 14, 1947).

In the *Heininger* case the question was whether legal expense incurred in protecting a business from destruction as a result of charges of illegal acts was an "ordinary and necessary" expense of the business. The Tax Court treated the question as a question of law and decided against the taxpayer. Appeal was taken to the Circuit Court, which reversed the Tax Court's holding. The case reached the Supreme Court, where the Circuit Court's decision was sustained. Of course, the *Dobson* rule was inapplicable. The striking feature of the *Heininger* case was that the question which was heard on appeal was whether protection of a business from destruction was a normal business purpose. That legal issue is presented in this case and will be further discussed in this brief.

IV.

Respondent Quotes the Tower Case, Yet He Completely Fails to Show a Single Finding of Fact Which, as His Quotation Requires, Negatives Bona Fides on the Part of the Petitioners.

Respondent reaches the heart of the problem when he quotes from the *Tower* case. (Br. 14.) As that quotation shows, the true question is whether there was a real intention to carry on business as a partnership. That intention of the parties, as respondent's quotation from the *Tower* case indicates, is to be "determined from testimony disclosed by their 'agreement, considered as a whole, and their conduct in execution of its provisions'." As respondent also points out (Br. 15), the agreement is in the record; and the Tax Court's findings of fact show what the conduct was in execution of its provisions. Does respondent point out any clause in the agreement, or any statement of the Tax Court in its findings of fact with respect to the conduct of the parties in execution of its provisions, which shows anything but a *bona fide* intention to carry on business as a partnership? Respondent has quoted from the *Tower* case but has failed to point to any specific portion of the findings of fact to which that quotation is intended to bear reference.

V.

The Purpose to Protect the Business From Destruction Is a Normal Business Purpose. Not Only Is It Consistent With But in Fact Confirms Bona Fides of the Partnership Here.

Respondent stresses the conclusion of the Tax Court that the purpose to prevent disruption or destruction of the business through seizure of the assets by the Government is not the kind of a business purpose essential to a valid partnership for income tax purposes. (Br. 16, 19.) The Supreme Court of the United States has held, however, that prevention of destruction of a business is a normal business purpose. *Commissioner v. Heininger*, *supra*, affirming C. C. A. 7, 133 F. (2d) 567. The question there, as already observed above, was whether a legal expense incurred in protecting a business from destruction was ordinary and necessary. The Circuit Court in that case stated:

“We think that where an expense is incurred which saves the life of a business, even for a time, it is, in the light of the above interpretation, not only a business expense, but a necessary business expense. Without the expenditure, there would have been no income in this case because there would have been no business. The business depended directly upon the expense incurred in the litigation. We therefore hold that the expense was both ordinary and necessary.”

And the Supreme Court stated:

“For respondent to employ a lawyer to defend his business from threatened destruction was ‘normal’; it was the response ordinarily to be expected.”

It would indeed be odd if anyone faced with destruction of his business failed to make an attempt to save it. Does that make the act done for that purpose any the less complete and *bona fide*? It would not even be strange under the circumstances here if petitioner had not only given half of his business to his children for the purpose of saving it, but had given them the entire business. What father conscious of the welfare of his children would fail to turn his business over to them where otherwise it would go down to destruction? Is a transfer for that reason any the less complete and *bona fide*? The facts here lend no support whatever to such a conclusion.

Respondent's charge is in fact a charge of fraud against petitioner Albert T. Quon. A transfer of assets could indeed be fraudulent, but that charge is not lightly to be made.

“A charge of fraud has always been regarded as a serious matter in the law. Not only is it never presumed, but the ordinary preponderance of evidence is not sufficient to establish such a charge.”

Kerbaugh v. Commissioner, 29 B. T. A. 1014,
aff'd 74 F. (2d) 749 (C. C. A. 1), 1935.

The facts here give such a charge no shadow of support.

VI.

The Tower Case Itself Shows the Importance, Both Separately and Cumulatively, of Petitioners' Five Points of Distinction From That Case. Those Points Cannot Be Merely Brushed Aside, as Respondent Attempts to Do.

Respondent tries to brush aside the distinctions pointed out by petitioners from the *Tower* and *Lusthaus* cases. With respect to the first distinction, that is, that the donee partners in question here are minor children instead of a wife, respondent cites a number of cases (Br. 18-19), in not one of which is the point discussed whether there is a difference between those relations. Had the facts otherwise in these cases given the taxpayer more support, that issue might have been presented. But nowhere was it even presented.

With respect to the second distinction, that of the presence of a business purpose here, the subject has already been covered above. With respect to the third distinction, the power of any trustee here to withdraw his interest and terminate the partnership, respondent completely evades the issue and discusses wholly unrelated subject matter. With respect to the fourth and fifth distinctions, respondent likewise closes his eyes to the issues. He makes no attempt to meet them, but just brushes them aside.

It must be borne in mind that petitioners did not point out any one of these distinctions as being conclusive in itself, but as being part of a complete picture establishing the *bona fides* of the partnership. If the elements of the *Tower* and *Lusthaus* cases with respect to which these distinctions were made were not important, why did the Supreme Court point them out so clearly and vividly?

VII.

The Recent Belcher Case Cited by Respondent Shows That the Question Is the Broad One of Bona Fides, as Maintained by Petitioners; and That Case's Analysis of Indicia in That Respect in Fact Supports Petitioners Here.

Respondent cites several decisions of the Circuit Court of Appeals for the Fifth Circuit, the most recent one of which is *Belcher v. Commissioner*, decided July 2, 1947. (Br. 17.) In that case the Court presents a rather complete restatement on the entire subject. As the Court there points out, no one factor is controlling. The question is one between reality and fiction, whether or not the partnership was *bona fide* or a mere sham. It points out several factors which may be taken into consideration in that connection. Among them are several which obviously support petitioners here:

1. "Whether the arrangement is between the head of the family and members of his family to whom he owes the obligation of support, and the dominant purpose of the scheme is merely to provide such support and at the same time to divide the income tax consequences among such members of his family";
2. "Whether there have been any proportionate distributions of earnings to the members of the alleged partnership";
3. "Whether the partnership was established merely to be an operating enterprise from which the dominant head kept in himself the title to physical assets of great value that ordinarily would be highly appropriate to the operation";

4. "Whether the power of unfettered command and control over the partnership, its assets, its business, and its profits is retained in, or conferred upon, the family head";
5. "Whether such a partnership interest is unalienable by a partner, or was transferred to him upon condition that he make a will for the return, upon his death, of such interest to his transferor."

Not all of the factors must be considered. The problem, as the *Belcher* case puts it, is to determine whether there are any indicia which demonstrate "the actuality, the reality, and the *bona fides* of the arrangement."

VIII.

The Feldman Case Is in Direct Conflict With the Holding of the Tax Court Here. This Is the Only Conclusion That Can Be Arrived at if We Are to Proceed Logically From the Facts to the Holding of the Court in Each Case.

Respondent in attempting to distinguish the *Feldman* case (Br. 21) really concedes that the citation of that case cannot be answered. He bases his distinction of that case solely on the ground that the trial court there decided in favor of the taxpayer. The Circuit Court there, however, made a complete analysis of the elements in that case which underlay the conclusion of the trial court. (Pet. Op. Br. pp. 13-14.) If the trial court's decision alone had been sufficient, why then that complete analysis? That analysis fully and logically supported the Circuit Court's affirmance. It more than supports the taxpayer here. As shown in petitioner's brief (p. 14), the case here is far stronger than the *Feldman* case.

IX.

**There Is No Need for Remand Here to Consider the
Applicability of the Clifford Case.**

Respondent in a footnote (Br. 12) suggests that if this Court should be of the opinion that the partnership here is a valid partnership for federal income tax purposes it will probably want to remand the case to the Tax Court in order to consider the possible application of the *Clifford* case. For the decision of that issue the record here is complete. As respondent points out (Br. 15), it contains all of the terms of the partnership agreement and of the trust instruments. It contains also the Tax Court's findings with respect to the conduct of the parties in carrying out that agreement. Let respondent show in what respect the record is insufficient to answer the requirements of the *Clifford* case.

Conclusion.

Petitioners submit that the case here is not within the ambit of the *Tower* and *Lusthaus* cases. The distributive share of the trusts in the net income of the Quon-Quon Company should therefore be taxed to the trusts and not to petitioners.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

August, 1947.

No. 11,626.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILY HO QUON and ALBERT T. QUON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review Decisions of the Tax Court
of the United States

PETITION OF LILY HO QUON AND ALBERT
T. QUON FOR REHEARING.

FILED

JAN 29 1948

PAUL P. O'BRIEN, CLERK

GEORGE T. ALTMAN,

215 West Seventh Street, Los Angeles 14,

Attorney for Petitioners.

No. 11,626.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILY HO QUON and ALBERT T. QUON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF LILY HO QUON AND ALBERT
T. QUON FOR REHEARING.

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

Come now petitioners in the above entitled matter and apply to the Court for a rehearing in order that there may be considered the applicability to this case of *Oyama v. State of California*, decided by the Supreme Court of the United States January 19, 1948, reversing the Supreme Court of California.

The *Oyama* case involved a gift by a resident alien ineligible to citizenship, to his minor son, a citizen. The gift was made by a purchase of land in the son's name, the father then having himself appointed guardian. Under the law of California the father could not own real estate, but the son could. The State charged that the real pur-

chaser and owner was the father, not the son, and that the purchase in the son's name was a mere technical shifting of title to avoid the California Alien Land Law. (C. C. H., U. S. Supreme Court Bulletin #44, p. 409.) But the Supreme Court of the United States reversed, saying that in the circumstances "the burden of proving that there was in fact no completed *bona fide* gift falls to him who would attack its validity." (*Supra*, p. 411.) With respect to the guardianship the Court observed that as guardian the father was subject to the law of trusts, citing Section 1400 of the California Probate Code. (*Supra*, p. 413, footnote 24.)

Here the facts are in substance the same. Petitioner Albert T. Quon was a resident of the United States but of Chinese ancestry, and therefore in 1941, the year here involved, ineligible to citizenship. (*Supra*, p. 405, footnote 3.) Solely because of his ancestry, and for no other reason, the business upon which his wife and four minor children, all citizens of this country, depended for their security, was threatened with destruction by the program established under executive order of freezing the assets of enemy aliens and aliens whose countries had been or were being subjected to enemy control. As a result of these impelling circumstances Albert T. Quon made the transfers involved here to his citizen wife and children. The *Oyama* case shows that from such circumstances no presumption of want of *bona fides* in the transfers can be drawn. That case shows therefore as complete *non sequiturs* the Tax Court's reasoning in its opinion here that the "desire to avoid the freezing of assets in fact indicates that the arrangement was intended merely as a *technical* shifting of title from alien to citizen" and that the "*purported* limited partners in a sense constituted *mere*

depositories of title for purposes other than those connoting a true partnership.” (Italics supplied.)

If this Court believes that any of the facts cited above are not clearly shown in the Tax Court’s findings, petitioners request a remand for that purpose. The *Oyama* decision of the Supreme Court of the United States was, of course, not available when the case here was argued before the Court below, or before this Court.

Wherefore, petitioners respectfully request that the Court grant this application for rehearing.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

Certificate of Counsel.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

GEORGE T. ALTMAN,
Attorney for Petitioners.

Dated: Los Angeles, California, January 28, 1948.

No. 11628

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD MILLER,

Appellant,

vs.

BANK OF AMERICA, N. T. & S. A., UNITED
STATES OF AMERICA and GEORGE C.
WELDEN, an individual doing business as
Wholesalers Adjustment Bureau of San Fran-
cisco,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

No. 11628

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD MILLER,

Appellant,

vs.

BANK OF AMERICA, N. T. & S. A., UNITED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BERNAL & BERNAL,
Bank of America Bldg.,
Berkeley 4, Calif.,
Attorneys for Appellant.

THOS. J. RIORDAN and
EUGENE H. O'DONNELL,
Russ Bldg.,
San Francisco 4, Calif.

FRANK J. HENNESSY,
United States Attorney.

WILLIAM E. LICKING,
Assistant United States Attorney.

EDWARD N. JACKSON and
JACK A. SEAMAN,
Central Tower Bldg.,
San Francisco 3, Calif.
Attorneys for Appellees.

In the Southern Division of the United States District Court for the Northern District of California

No. 23664-G

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association,

Plaintiff,

vs.

UNITED STATES OF AMERICA; GEORGE C. WELDEN, individually and doing business under the firm name and style of WHOLESALERS ADJUSTMENT BUREAU OF SAN FRANCISCO; LYLE B. EVERETT and JOSEPH L. McEACHERN, individually and as copartners doing business under the firm name and style of EVERETT and McEACHERN LUMBER COMPANY; and EDWARD MILLER,

Defendants.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts are true and may be considered by the Court as in evidence in the trial of the above case:

This is an action in interpleader brought by the plaintiff against conflicting claimants to a fund in the amount of \$3.99.59, originally on deposit in the Healdsburg Branch of the plaintiff corporation

located at Healdsburg, Sonoma County, California, to the credit of the defendant Lyle B. Everett. This amount was by the plaintiff on the 7th day of September, 1944, pursuant to an order of the above entitled Court deposited by the plaintiff with the clerk of said Court to abide the result of this action.

The default of the defendants Lyle B. Everett and Joseph L. McEachern was granted on October 15, 1945, on the motion of plaintiff, no answer having been filed by said defendants or either of them. The other defendants have answered and the nature of their claims is set out in the pleadings on file herein.

The plaintiff has filed a Motion for an Interlocutory Decree of Dismissal and has been dismissed from the action. There is still pending before the Court plaintiff's motion for order allowing attorney's fees and costs. This is supported by an affidavit on file herein. No affidavits in opposition are on file.

The claim of the defendant George C. Welden, doing business under the firm name and style of Wholesalers Adjustment Bureau of San Francisco, is based upon the following facts: On November 22, 1943, a writ of attachment dated November 19, 1943, was served upon the plaintiff bank. This writ of attachment issued out of action Number 323811 in the Superior Court of the State of California in and for the City and County of San Francisco, entitled Wholesalers Adjustment Bureau of San Francisco versus Lyle B. Everett, et al, seeking a recovery of \$2985.30. On April 20, 1944, judgment

in the sum of \$2052.58 was entered by Stipulation between the parties in said action. On April 21, 1944, the above judgment was recorded in Volume 602, p. 419 of the official records of the City and County of San Francisco. On April 25, 1944, a writ of execution issuing under said judgment in the amount of \$2078.36 was served upon plaintiff bank.

The claim of the defendant Edward Miller to the fund on deposit arises out of the following facts: Edward Miller instituted an action against the Everett and McEachern Lumber Company which was a copartnership composed of the defendants Lyle B. Everett and Joseph L. McEachern. This action in the Superior Court of the State of California in and for the County of Mendocino is entitled Edwin Miller versus Everett and McEachern Lumber Company, et al., Number 14279. On January 4, 1944, a writ of attachment issuing out of said action in the amount of \$8212.52 was served upon the plaintiff bank. On March 11, 1944, judgment by default was entered in said action in favor of plaintiff in the amount of \$5052.43, attorneys fees at 15% of amount received, interest from date of judgment at 7% and costs in the amount of \$149.75, and that said judgment was regularly entered March 11, 1944, in Book 21, page 269 of Judgments in the office of the County Clerk of Mendocino County, California.

The claim of the United States is based upon the following facts: There is due to the United States from defendants Lyle B. Everett and Joseph L. Mc-

Eachern \$2520.75 for Withholding Tax, and additional penalties and interest thereon as provided by law, duly assessed by the United States Commissioner of Internal Revenue on March 25, 1944; the Commissioner's assessment list of said tax was received by the United States Collector of Internal Revenue for the First Collection District of California on March 27, 1944; Notice and Demand for payment (T. D. form #17) was made on tax payers on April 3, 1944; warrant for distraint (T. D. form #69) issued by said Collector on April 3, 1944, and on April 21, 1944, at 11 minutes past 11:00 o'clock A.M. Notice of Tax Lien (T. D. form #668) for said taxes with additional interest and penalties thereon in the total amount of \$2620.51 was filed of record with the County Recorder of Sonoma County, California. There is due to the United States from defendants Lyle B. Everett and Joseph L. McEachern \$629.85 for Social Security tax and additional penalties and interest thereon, duly assessed by the United States Commissioner of Internal Revenue on April 11, 1944; the Commissioner's assessment list of said tax was received by the United States Collector of Internal Revenue for the First Collection District of California on April 14, 1944; Notice and demand for payment (T. S. form #17) was made on taxpayers April 17, 1944, and on April 21, 1944, at 10 minutes past 11:00 o'clock A.M. A Notice of Tax Lien for said taxes with additional penalties and interest thereon in the total amount of \$661.34 was filed of record with the County Recorder of Sonoma County, California. The total

amount due the United States from said taxpayers on account of said taxes assessed and noticed as aforesaid is \$3281.95, together with interest thereon from April 21, 1944, as provided by law. No part of said sum has been paid and the whole thereof remains due, owing and unpaid to the United States.

On April 21, 1944, a Notice of Levy of said taxes was served on the plaintiff bank at its Healdsburg Branch, at Healdsburg, California.

Dated: This 3rd day of May, 1946.

Respectfully submitted,

THOS. J. RIORDAN &
EUGENE H. O'DONNELL,

Attorneys for Bank of America National Trust and
Savings Association, Plaintiff.

EDWARD N. JACKSON,
Attorney for Defendant, Wholesalers Adjustment
Bureau.

JOSEPH W. BERNAL,
Attorney for Defendant,
Edward Miller.

FRANK J. HENNESSY,
United States Attorney.
WILLIAM E. LICKING,
Assistant United States
Attorney.

Attorneys for Defendant, United States of America.

[Endorsed]: Filed May 3, 1946.

[Title of District Court and Cause.]

AMENDED STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the Stipulation of Facts heretofore filed in the above entitled matter may be, and is hereby, amended to read on page 2 thereof, commencing on line 28 of said page, as follows:

“On April 20, 1944, the Court rendered judgment in the sum of \$2052.58, which was entered in the minutes of the Court on said date by Stipulation between the parties in said action. On April 21, 1944, the above judgment was entered and recorded in Volume 602, p. 419 of the Judgment Book of said Court, in and for the City and County of San Francisco.”

And It Is Stipulated that the following sentences, commencing on line 28 of page 2 of said Stipulation of Facts, and continuing to the end of the sentence on line 32 of page 2, may be stricken from the Stipulation now on file:

“On April 20, 1944, judgment in the sum of \$2052.58 was entered by Stipulation between the parties in said action. On April 21, 1944, the above judgment was recorded in Volume 602, p. 419 of the official records of the City and County of San Francisco.”

It Is Hereby Further Stipulated and Agreed that each party may have to and including July 29,

1946, within which to file reply briefs to the opening briefs of the parties heretofore submitted.

/s/ THOS. J. RIORDAN,

/s/ EUGENE R. O'DONNELL,

Attorneys for Bank of America National Trust and Savings Association, Plaintiff.

/s/ EDWARD N. JACKSON,

Attorney for Defendant, Wholesalers Adjustment Bureau.

/s/ JOSEPH W. BERNAL,

Attorney for Defendant,

Edward Miller.

/s/ WILLIAM E. LICKING,

Assistant United States

Attorney.

Attorneys for Defendant, United States of America.

[Endorsed]: Filed July 26, 1946.

[Title of District Court and Cause.]

MEMORANDUM DECISION

It appears from the stipulation of facts that the tax claim of the United States became a recorded lien by the filing of notice of lien (26 USCA 3672) prior to the effectuation as liens of the judgments of the creditor defendants. Hence the tax lien of the United States was superior to the judgment claims of defendants. *Underwood v. U. S. Cir.* 5, 118 Fed. 2d 760; *Mackenzie v. U. S. Cir.* 9, 109 Fed. 2d 540; *U. S. v. Record Pub. Co.*, 60 Fed. Supp. 194.

Upon findings to be presented, the funds on deposit will be ordered paid to the United States less costs of plaintiff and attorneys fees in the sum of \$200.00. (Mass. Mutual Life Ins. Co. v. Morris, Cir. 9, 61 Fed. 2d 104; Globe Indemnity Co. v. Puget Sound Co., Inc., 154 Fed. 2d 249.)

Dated: September 17, 1946.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 17, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled case came on regularly for trial before the Court, sitting without a jury, at San Francisco, on the 15th day of July, 1946, the Honorable Louis E. Goodman, presiding; the plaintiff appeared by Thomas J. Riordan and Eugene H. O'Donnell, its attorneys, the defendant United States of America, appeared by Frank J. Hennessy, United States Attorney for the Northern District of California, and William E. Licking, Assistant United States Attorney for said District, the defendant George C. Welden appeared by Edward N. Jackson, his attorney, and the defendant Edward Miller appeared by Joseph W. Bernal, his attorney; the defendants, Lyle B. Everett and Joseph L. Mc-

Eachern, did not appear and their default had been previously entered; whereupon evidence, in the form of a written Stipulation of Facts, was introduced and the parties and the Court having considered the evidence makes the following findings of fact:

FINDINGS OF FACT

I.

This is an action of interpleader brought by the plaintiff against conflicting claimants to a fund in the amount of \$3199.59, originally on deposit in the Healdsburg Branch of the plaintiff corporation located at Healdsburg, Sonoma County, California, to the credit of the defendant, Lyle B. Everett. On the 7th day of September, 1944, said amount was, by the Order of this Court deposited with the Clerk of said Court to abide the result of this action.

II.

The default of the defendants, Lyle B. Everett and Joseph L. McEachern, was granted on October 15, 1945, on the motion of the plaintiff, no Answer or other pleading having been filed by said defendants, or either of them. All other defendants answered. The plaintiff filed a motion for an Interlocutory Decree of Dismissal and has been dismissed from the action. Plaintiff's motion for an order allowing its attorneys' fees and costs was, at the time of submission, still pending before the Court. Said motion is supported by an Affidavit on file herein and no Affidavits in opposition are on file.

III.

The claim of the defendant George C. Welden, doing business under the firm name and style of Wholesalers Adjustment Bureau of San Francisco, to the fund in question, is based upon the following facts: On November 22, 1943, a writ of attachment dated November 19, 1943, was served upon the plaintiff bank. This writ of attachment issued out of action Number 323811 in the Superior Court of the State of California in and for the City and County of San Francisco, entitled Wholesalers Adjustment Bureau of San Francisco versus Lyle B. Everett et al, seeking a recovery of \$2985.30. On April 20, 1944, the Court rendered judgment in the sum of \$2052.58 which was entered in the minutes of the Court on said date by Stipulation between the parties in said action. On April 21, 1944, the above judgment was entered and recorded in Volume 602, p. 419 of the judgment book of said Court, in and for the City and County of San Francisco. On April 25, 1944, a writ of execution issuing under said judgment in the amount of \$2078.36 was served upon plaintiff bank.

IV.

The claim of the defendant Edward Miller to the fund on deposit arises out of the following facts: Edward Miller instituted an action against the Everett and McEachern Lumber Company which was a copartnership composed of the defendants Lyle B. Everett and Joseph L. McEachern. This action in the Superior Court of the State of California

in and for the County of Mendocino is entitled Edwin Miller versus Everett and McEachern Lumber Company, et al, Number 14279. On January 5, 1944, a writ of attachment issuing out of said action in the amount of \$8212.52 was served upon the plaintiff bank. On March 11, 1944, judgment by default was entered in said action in favor of plaintiff in the amount of \$5052.43, attorneys fees at 15% of amount received, interest from date of judgment at 7% and costs in the amount of \$149.75, and that said judgment was regularly entered March 11, 1944, in Book 21, page 269 of Judgments in the office of the County Clerk of Mendocino County, California.

V.

The claim of the United States is based upon the following facts: There is due to the United States from defendants Lyle B. Everett and Joseph L. McEachern \$2520.75 for Withholding Tax, and additional penalties and interest thereon as provided by law, duly assessed by the United States Commissioner of Internal Revenue on March 25, 1944; the Commissioner's assessment list of said tax was received by the United States Collector of Internal Revenue for the First Collection District of California on March 27, 1944; Notice and Demand for payment was made on taxpayers on April 3, 1944; warrant for distraint issued by said Collector on April 3, 1944, and on April 21, 1944, at 11 minutes past 11:00 o'clock A.M., Notice of Tax Lien for said taxes with additional interest and penalties thereon

in the total amount of \$2620.51 was filed of record with the County Recorder of Sonoma County, California.

There is due to the United States from defendants Lyle B. Everett and Joseph L. McEachern \$629.85 for Social Security tax and additional penalties and interest thereon, duly assessed by the United States Commissioner of Internal Revenue on April 11, 1944; the Commissioner's list of said tax was received by the United States Collector of Internal Revenue for the First Collection District of California on April 14, 1944; Notice and Demand for payment was made on taxpayers April 17, 1944, and on April 21, 1944, at 10 minutes past 11:00 o'clock A.M. a Notice of Tax Lien for said taxes with additional penalties and interest thereon in the amount of \$661.34 was filed of record with the County Recorder of Sonoma County, California. The total amount due the United States from said taxpayers on account of said taxes assessed and noticed as aforesaid is \$3281.95 together with interest thereon from April 21, 1944, as provided by law. No part of said sum has been paid and the whole thereof remains due, owing and unpaid to the United States.

VI.

On April 21, 1944, the Collector of Internal Revenue for the First Collection District of California served a Notice of Levy for said taxes upon the plaintiff bank at its Healdsburg Branch, in Healdsburg, Sonoma County, California.

VII.

That the reasonable value of attorneys fees incurred by the plaintiff in this action amount to the sum of \$200.00.

From the foregoing findings of fact the Court draws the following Conclusions of Law:

I.

That the defendants, Lyle B. Everett and Joseph L. McEachern are now and at all times since the 25th day of March, 1944, have been indebted to the defendant, United States of America, in the sum of \$2520.70, with interest and penalties as provided by law, for Withholding Taxes assessed against them.

II.

That the defendants, Lyle B. Everett and Joseph L. McEachern, are now and at all times since the 11th day of April, 1944, have been indebted to the defendant, United States of America, in the sum of \$629.85, with interest and penalties as provided by law, for Social Security Taxes assessed against them.

III.

That the defendants, Lyle B. Everett and Joseph L. McEachern, are now and at all times since the 21st day of April, 1944, have been indebted to the defendant, United States of America, in the total amount of \$3281.95, together with interest from that date as provided by law.

IV.

That a lien in favor of the United States arose on the 27th day of March, 1944, when the Collector of Internal Revenue for the First Collection District of California received the Commissioner of Internal Revenue's Assessment List of March 25, 1944, carrying an assessment of \$2520.75 for Withholding Tax with additional penalties and interest, against the defendants Lyle B. Everett and Joseph L. McEachern, which lien attached to all of the property and rights to property, whether real or personal, belonging to said defendants Lyle B. Everett and Joseph L. McEachern and particularly to the sum of \$3199.59 then belonging to said Lyle B. Everett and on deposit to his credit in the Healdsburg Branch of the plaintiff corporation at Healdsburg, in Sonoma County, California, and now on deposit with the Clerk of this Court to abide the result of this action.

V.

That a lien in favor of the United States arose on the 14th day of April, 1944, when the Collector of Internal Revenue for the First Collection District of California received the Commissioner of Internal Revenue's Assessment List of April 11, 1944, carrying an assessment of \$629.85 for Social Security tax, and additional penalties and interests against the defendants Lyle B. Everett and Joseph L. McEachern, which lien attached to all of the property and rights to property, whether real or personal, belonging to said defendants, Lyle B. Ev-

erett and Joseph L. McEachern and particularly to the sum of \$3199.59 then belonging to said Lyle B. Everett and on deposit to his credit in the Healdsburg Branch of the plaintiff corporation at Healdsburg, in Sonoma County, State of California, and now on deposit with the Clerk of this Court to abide the result of this action.

VI.

That on the 21st day of April, 1944, said liens upon said sum of \$3199.59 were rendered valid as to all persons when the Collector of Internal Revenue filed notices thereof in the office of the County Recorder of Sonoma County, California, and served notice of levy thereon upon plaintiff bank at its Healdsburg Branch, in Healdsburg, Sonoma County, California.

VII.

That the defendants, Lyle B. Everett and Joseph L. McEachern, have also been indebted to the defendant George C. Welden in the sum of \$2052.58 at all times since April 20, 1944, because of a judgment obtained against them on said day by said George C. Welden in the Superior Court of the State of California in and for the City and County of San Francisco, but that neither said indebtedness nor the judgment obtained thereon constituted as of April 21, 1944, the date upon which the United States perfected its liens by recording notice thereof, a lien upon the sum of \$3199.59 then belonging to said Lyle B. Everett and on deposit to his credit

in the Healdsburg Branch of the plaintiff corporation at Healdsburg in Sonoma County, State of California, and now on deposit with the Clerk of this Court to abide the result of this action.

VIII.

That the defendants, Lyle B. Everett and Joseph L. McEachern have also been indebted to the defendant, Edward Miller, in the sum of \$5052.43, plus attorney's fees, interest and costs, at all times since the 11th day of March, 1944, because of a default judgment entered against them and in favor of the defendant, Edward Miller, on said day in the Superior Court of the State of California, in and for the County of Mendocino but that neither said indebtedness nor the judgment obtained thereon constituted, as of April 21, 1944, the date upon which the United States perfected its liens, by recording notices thereof, a lien upon the sum of \$3199.59 then belonging to said Lyle B. Everett and on deposit to his credit in the Healdsburg Branch of the plaintiff corporation at Healdsburg, in Sonoma County, State of California, and now on deposit with the Clerk of this Court to abide the result of this action.

IX.

That the tax liens of the United States are superior to the rights, claims and liens of each and all of the creditor defendants in and to the fund of \$3199.59 on deposit with the Clerk because recorded in Sonoma County, California, prior to the effec-

tuation of any judgment liens in said County by any of said defendants.

X.

That the sum of \$3199.59 belonging to the defendant, Lyle B. Everett, and previously on deposit to his credit in the Healdsburg Branch of the plaintiff corporation at Healdsburg in Sonoma County, State of California, and now on deposit with the Clerk of this Court should be distributed as follows:

1. The sum of \$200.00 to the plaintiff, Bank of America National Trust and Savings Association for attorneys fees incurred by it in this action, plus its costs to be taxed;
2. The remainder to the United States of America to be applied upon the Withholding and Social Security taxes due it from the defendants, Lyle B. Everett and Joseph L. McEachern, the payment of which is secured to it by the tax liens of which notices were filed in the office of the County Recorder of Sonoma County, California, on the 21st day of April, 1944.

XI.

That a Decree should be entered in accordance with the foregoing Conclusions of Law.

Dated: This 7th day of February, 1947.

LOUIS E. GOODMAN,
United States District Judge.

Approved as to Form:

.....

Attorneys for Plaintiff.

.....

Attorney for George C.
Welden.

.....

Attorney for Edward Miller.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Asst. United States Attorney.

Attorneys for Defendant, United States of America.

[Endorsed]: Filed Feb. 10, 1947.

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia

No. 23664-G

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants.

DECREE

The above entitled case came on regularly for trial
before the Court sitting without a jury at San Fran-
cisco, California, on the 15th day of July, 1946, the

Honorable Louis E. Goodman presiding. The plaintiff appeared by Thomas J. Riordan and Eugene H. O'Donnell, its attorneys. The defendant United States of America, appeared by Frank J. Hennessy, United States Attorney for the Northern District of California, and William E. Licking, Assistant United States Attorney for said District. The defendant George C. Welden appeared by Edward N. Jackson, his attorney; the defendant Edward Miller, appeared by Joseph W. Bernal, his attorney. The defendants, Lyle B. Everett and Joseph L. McEachern, did not appear, their default having been previously entered.

Evidence in the form of a Stipulation of Facts was introduced and the case thereafter submitted for decision upon Briefs filed on behalf of the parties appearing.

The Court has considered the evidence and the Briefs presented by the parties, and has made and entered its Findings of Fact and Conclusions of Law herein.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the plaintiff Bank of America National Trust and Savings Association receive from the sum of \$3,199.59 now on deposit with the Clerk of this Court the sum of \$200.00 for attorneys fees and its costs herein to be taxed;

2. That the defendant United States of America receive the remainder of the said sum of \$3,199.59, the same to be paid by the Clerk of this Court to the Collector of Internal Revenue to be ap-

plied upon the Withholding and Social Security tax due from the defendants, Lyle B. Everett and Joseph L. McEachern, to the United States of America.

Dated: April 2, 1947.

LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as required by Rule 5(d):

FRANK J. HENNESSY,
United States Attorney.
WILLIAM E. LICKING,
Asst. United States Attorney,
Attorneys for the United
States of America.

RIORDAN & O'DONNELL,
Attorneys for Plaintiff.

EDWARD N. JACKSON,
Attorney for George C.
Welden.

JOSEPH W. BERNAL,
Attorney for Edward Miller.

[Endorsed]: Filed Apr. 3, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendant, Edward Miller, a married man, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit,

from the Final Judgment in the above entitled action, which was entered April 3rd, 1947.

BERNAL & BERNAL.

By JOSEPH W. BERNAL,
Attorney for Defendant,
Edward Miller.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

STATEMENTS OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
THE APPEAL

1. That the District Court erred in entering the Final Judgment in favor of the Bank of America, National Trust and Savings Association, in the amount of Two Hundred Dollars (\$200.00) for attorneys' fees.

2. That the Court erred in entering a Final Judgment in favor of the United States of America, for the balance of the sum of Three Thousand One Hundred Ninety-nine and 59/100ths Dollars (\$3,199.59), in the hands of the Clerk, for the benefit of the Collector of Internal Revenue, to be applied upon the Withholding and Social Security Taxes due from defendants Lyle B. Everett and Joseph L. McEachern, in that:

(a) The judgment in Edward Miller vs. Everett and McEachern, in the Superior Court of

Mendocino County, State of California, was entered prior to April 21st, 1944, the date on which the United States Collector of Internal Revenue caused to be filed, a Notice of Tax Lien, with the County Recorder of Sonoma County, California.

(b) That there were no other judgments entered of record against Everett and McEachern, prior to the Notice of Tax Lien filed by the Collector of Internal Revenue on April 21st, 1944, with the County Recorder of Sonoma County.

BERNAL & BERNAL.

By JOSEPH M. BERNAL,

Attorney for Defendant

Edward Miller.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

BOND FOR STAY OF EXECUTION
AND COST ON APPEAL

Know All Men By These Presents, That we, Edward Miller, as Principal, and the American Employers' Insurance Company, a Corporation, organized under the laws of the Commonwealth of Massachusetts, with its principal place of business in the City of Boston, in said Commonwealth, as Surety, are held and firmly bound unto the United States

of America in the sum of Five Hundred and No/100ths (\$500.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, the said Edward Miller binds himself, his heirs, executors and administrators and the said American Employers' Insurance Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Signed, Sealed and Dated this 25th day of April, 1947.

Whereas, on the 3rd day of April, 1947, in an action depending in the United States District Court for the Northern District of California, Southern Division, between the Bank of America N. T. & S. A., a National Bank Association, and defendant Edward Miller and other defendants, a final judgment was entered and the said Edward Miller has filed a notice of appeal from such final judgment to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of this obligation is such that if the said Edward Miller shall prosecute his appeal to effect and shall pay all costs of the action, costs on appeal and interest at the legal rate, which shall be compensation for the use and detention of the property and damages for delay, if the appeal is dismissed or the final judgment is affirmed or such costs as the said Circuit Court of Appeal may award against the said Edward Miller if the final judgment is modified or in any other event then this obligation is to be void, otherwise to remain in full force and effect.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court may, upon notice of not less than ten days to the surety above named proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefore against said surety and award execution therefore.

Signed and Sealed in the Presence of

.....
.....

Principal
AMERICAN EMPLOYERS'
INSURANCE COMPANY

/s/ By JOHN A. VIOLICH,
Attorney-in-Fact.

The Premium for this Bond is \$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On This 25th day of April, A.D. 1947, before me, Sam M. Markowitz, a Notary Public in and for said County and State, personally appeared John A. Violich, known to me to be the person whose name is subscribed to the within Instrument, as the Attorney-in-fact of American Employers' Insurance Company, and acknowledged to me that he subscribed the name of American Employers' Insurance Company thereto as principal and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] SAM M. MARKOWITZ,
Notary Public in and for Said
County and State.

Acknowledgment—Attorney-in-Fact.

A15446.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD

Comes now Edward Miller, a married man, appellant herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above cause:

1. Complaint for interpleader and declaratory relief filed September 7th, 1944.
2. Answer of defendant Edward E. Miller, filed November 18th, 1944.
3. Answer of defendant Wholesalers Adjustment Bureau of San Francisco, filed December 8th, 1944.
4. Answer of U.S.A. filed January 4, 1945.
5. Answer of defendant Edward Miller to cross-complaint of Wholesalers Adjustment Bureau of San Francisco, filed February 9th, 1945.

6. Stipulation of Facts filed May 3rd, 1946.
7. Amended Stipulation of Facts, filed July 26, 1946.
8. Memorandum Decision, filed September 17, 1946.
9. Findings of Fact and Conclusions of Law, filed February 7th, 1947.
10. Final Judgment entered of record April 3, 1947.
11. Notice of Appeal.
12. Bond for costs on appeal.
13. Statement of points upon which appellant intends to rely upon appeal.
14. Designation of contents of record on appeal.

BERNAL & BERNAL.

By JOSEPH W. BERNAL,

Attorneys for Defendant,

Edward Miller.

[Endorsed]: Filed May 5, 1947.

District Court of the United States

Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, contain a full, true, and correct transcript of the records and

proceedings in the cause of Bank of America N. T. S. A. vs. United States, Wholesalers Adjustment Bureau of S. F., et al., No. 23664-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$9.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of May, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ By E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 11628. United States Circuit Court of Appeals for the Ninth Circuit. Edward Miller, Appellant, vs. Bank of America, N. T. & S. A., United States of America, and George C. Welden, an individual doing business as Wholesalers Adjustment Bureau of San Francisco, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 12, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11628

EDWARD MILLER,

Appellant,

vs.

BANK OF AMERICA, et al.,

Respondents.

STIPULATION TO AMEND DESIGNATION
OF CONTENTS OF RECORD

It is hereby stipulated by and between the respective parties hereto that the following items may be excluded from the contents of the record on appeal, in the above entitled matter:

1. Complaint for interpleader and declaratory relief filed September 7th, 1944.

2. Answer of defendant Edward E. Miller, filed November 18th, 1944.

3. Answer of defendant Wholesalers Adjustment Bureau of San Francisco, filed December 8th, 1944.

4. Answer of U.S.A. filed January 4, 1945.

5. Answer of defendant Edward Miller to cross-complaint of Wholesalers Adjustment Bureau of San Francisco, filed February 9th, 1945.

It is agreed that this Stipulation may be a part of the contents of the record on appeal.

It is further agreed that, if the Court determines

that attorneys' fees were allowable, no opposition will be made to the reasonableness of the attorneys' fees allowed to respondent Bank of America in the Court below.

Dated: May 29th, 1947.

BERNAL & BERNAL.

/s/ By JOSEPH W. BERNAL,
Attorneys for Appellant,
Edward Miller.

/s/ EUGENE H. O'DONNELL,
Attorney for Respondent, Bank of America Na-
tional Trust and Savings Association.

/s/ WILLIAM E. LICKING,
Assistant United States Attorney, Attorney for Re-
spondent, United States of America.

(Signed by Joseph W. Bernal on authority of
William E. Licking.)

[Endorsed]: Filed June 2, 1947.

No. 11,628

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD MILLER,

Appellant,

VS.

BANK OF AMERICA, N. T. & S. A., UNITED
STATES OF AMERICA and GEORGE C. WEL-
DEN, an individual doing business as
Wholesalers Adjustment Bureau of San
Francisco,

Appellees.

APPELLANT'S OPENING BRIEF.

BERNAL & BERNAL,
212 Bank of America Building, Berkeley 4, California,
Attorneys for Appellant.

FILED

JUL 28 1947

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No. 11628

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD MILLER,

Appellant,

vs.

BANK OF AMERICA, N. T. & S. A., UNITED
STATES OF AMERICA and GEORGE C. WEL-
DEN, an individual doing business as
Wholesalers Adjustment Bureau of San
Francisco,

Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Article III, Section 2, Subdivision 1 of the United States Constitution provides that the judicial power shall extend to controversies to which the United States will be a party. In the matter now on appeal, the United States of America was served and appeared in the proceeding in the District Court of the United States for the Northern District of California, Southern Division.

STATEMENT OF FACTS.

This matter was tried in the District Court upon a stipulation of facts (Transcript of Record, pp. 2-6), and an amended stipulation of facts (Transcript of Record, pp. 7-8).

An action for interpleader was brought by the Bank of America, National Trust and Savings Association, a National Banking Association, against the United States of America and two attaching creditors and the owners of the fund in the bank, namely, Everett and McEachern, individually and as a partnership. (Transcript of Record, pp. 2-3.)

The Bank of America will be referred to hereinafter, for convenience, as the "Bank." The United States of America will be referred to hereinafter as the "Government," and Appellant, Edward Miller will be referred to as "Miller," and defendant in the District Court, George C. Welden, individually and doing business under the firm name and style of Wholesalers Adjustment Bureau of San Francisco, will be referred to as "Welden."

The default of defendants Everett and McEachern was granted on October 15, 1945. (Transcript of Record, p. 3, lines 7, 8 and 9.)

The chronology of events is as follows:

On November 22, 1943, Welden levied an attachment on the funds of Everett and McEachern in the Bank. (Transcript of Record, p. 11, lines 5, 6 and 7.)

The amount on deposit in the Bank in the account of Everett and McEachern was Three Thousand One Hundred Ninety-nine and 59/100ths Dollars (\$3,199.59). (Transcript of Record, p. 10, line 10.)

On January 5, 1944, Miller attached the fund. (Transcript of Record, p. 12, lines 3-5.)

On March 11, 1944, Miller obtained judgment in the Superior Court of the County of Mendocino, in the amount of Five Thousand Fifty-two and 43/100ths Dollars (\$5,052.43), plus attorneys' fees and said judgment was regularly entered March 11, 1944, in Book 21, Page 269 of Judgments in the office of the County Clerk of Mendocino County, California. (Transcript of Record, p. 12, lines 6-13.)

On March 25, 1944, the assessment list was received by the United States Collector of Internal Revenue for Two Thousand Five Hundred Twenty and 75/100ths Dollars (\$2,520.75) withholding tax due from Lyle B. Everett and Joseph L. McEachern to the Government. (Transcript of Record, p. 12, lines 15-26.) On April 11, 1944, the Collector of Internal Revenue received the assessment list showing Six Hundred Twenty-nine and 85/100ths Dollars (\$629.85) due against Everett and McEachern for Social Security taxes. (Transcript of Record, p. 13, lines 4-12.)

On April 21, 1944, at ten minutes past eleven o'clock A. M., a notice of tax lien for the Social Security taxes, in the amount of Six Hundred Sixty-one and 34/100ths Dollars (\$661.34) was filed of record with the County Recorder of Sonoma County, California. (Transcript of Record, p. 13, lines 14-18.)

That on April 21st, 1944, at eleven minutes after eleven o'clock A. M., a notice of tax lien for the Withholding Taxes, in the amount of Two Thousand Six Hundred Twenty and 51/100ths Dollars (\$2620.51)

was filed of record by the Government with the County Recorder of Sonoma County, California. (Transcript of Record, p. 12, line 30, to p. 13, line 3.)

The Bank had its office at Healdsburg, Sonoma County, California, and the fund was located at the office of the Bank at said place. (Transcript of Record, p. 10, lines 8-17.)

On April 21, 1944, the Judgment of Welden was entered in Volume 602, page 419 of the Judgment Book of the Superior Court of the State of California, in and for the City and County of San Francisco, and on April 25, 1944, a Writ of Execution issued under said Judgment, in the amount of Two Thousand Seventy-eight and 36/100ths Dollars (\$2,078.36). (Transcript of Record, page 11, lines 16-22.)

For the convenience of the Court we have set out a schedule of dates which may aid the Court in keeping the order of events clearly in mind:

<u>Date</u>	<u>Welden</u>	<u>Miller</u>	<u>U. S.</u>
Nov. 22, 1943	Attachment Levy		
Jan. 5, 1944		Attachment Levy	
March 11, 1944		Judgment Entered	
March 25, 1944			Assessment List
April 11, 1944			Assessment List
April 21, 1944 (at 10' & 11' after 11:00 a.m.)			Notice Filed
April 21, 1944 (No min. or hour)	Judgment Entered		

STATEMENT OF THE QUESTION.

Is a judgment creditor within the meaning of Section 3672(a) of the Internal Revenue Code, as amended, one who has had a judgment entered but has not levied on the personal property after judgment entered, or must he have made a levy of execution on the property?

SPECIFICATION OF ERRORS.

Appellant excepts to the findings of the District Court contained in Paragraphs 8 and 9 of the Findings of Fact and Conclusions of Law (Transcript of Record, pp. 17-18), and in particular as follows:

1. Wherein the Court finds:

“But that neither said indebtedness nor the judgment obtained thereon constituted, as of April 21, 1944, the date upon which the United States perfected its lien, by recording notices thereof, a lien upon the sum * * *” (Transcript of Record, p. 17, lines 14-18.)

2. And, insofar as it affects appellant Miller, the findings of the Court are as follows:

“That the tax liens of the United States are superior to the rights, claims and liens of each and all of the creditor defendants in and to the fund * * *” (Transcript of Record, page 17, lines 26-28.)

ARGUMENT OF THE CASE.

(a) WHAT IS THE MEANING OF THE WORDS "JUDGMENT CREDITOR" IN SECTION 3672, SUBDIVISION (a)?

The relevant federal tax legislation regarding priority of tax liens is contained in the Internal Revenue Code of the United States, as amended, and is as follows:

Sec. 3670. Property Subject to Lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Sec. 3671. Period of Lien.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Sec. 3672. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors (As amended by § 401, 1939 Act; § 505, 1942 Act.)

(a) Invalidity of Lien Without Notice.—*Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Collector.* (Emphasis ours.)

(1) Under State or territorial laws.—In the office in which the filing of such notice is author-

ized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or * * *

By the act of the Legislature of the State of California, of June 22, 1923, effective August 17, 1923, provision was made by the State of California for the recording of the liens referred to in Section 3672(a). It will also be noted that the notice of liens were filed with the County Recorder of Sonoma County, California. (Transcript of Record, Findings of Fact, paragraph V, pp. 12-13, line 30, p. 12 to line 3, p. 13, and lines 14-17.)

1. A lien upon all real and personal property arises in favor of the United States at the time the assessment list is received by the collector, and is discharged only in favor of certain classes of third parties, among whom are judgment creditors.

In *MacKenzie v. United States of America*, 109 Fed. (2d) 540, the Court said:

“An examination of the legislative history of Section 3186 makes it clear that Congress did so intend. *Prior to the enactment of the amendment in 1913 the Act contained no provision for priority on the part of any third parties.* Decisions under the Act prior to 1913 repeatedly held that no third parties, not even innocent purchasers for value, were protected under any circumstances from an unrecorded tax lien. *United States v. Snyder*, 149 U.S. 210, 13 Sup. Ct. 846. In 1913 Congress added the provision that the tax lien

shall not be valid against 'any mortgagee, purchaser, or judgment creditor' until recordation of the notice. Congress at this time undoubtedly recognized that under the statute as it existed prior to 1913 no third person was protected under any circumstances, from an unrecorded federal tax lien. By the 1913 amendment it intended to extend protection, not to all third parties, but to the three classes of third parties designated therein, namely, mortgagees, purchasers and judgment creditors. *We conclude that in order to be protected the claimant must show that he is within one of those three classes.*" (Emphasis ours.)

In *Manufacturers Trust Co. v. Sobel*, 175 Misc. 1067, 26 N. Y. S. (2d) 145, 28 A.F.T.R. 186, the United States contended that a judgment creditor who had not levied against the fund was subordinate to the tax lien, notice of which was subsequently filed with the Clerk. The Court held that a levy of execution under the judgment was not necessary.

The Court said at page 146:

"It is unnecessary to follow the argument, as by a plain reading of the statute a judgment creditor in the circumstances here is placed ahead of the government. The language can have no other meaning * * *"

And at page 147 the Court said:

"No question of strict versus loose construction arises. *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 63 L. Ed. 211. There is no room for construction as the statute as to these classes of persons is specific."

In *U. S. v. Record Publishing Co.* (D. C. Calif. 1945) 60 Fed. Supp. 194, the Court held that a judgment creditor that had levied on his judgment was superior to the government liens subsequently filed for record in the county. However, there was no discussion as to the need for a levy.

In *Chalmers and Williams v. Surprise* (1919) 70 Ind. App. 646, 123 N. E. 841 at p. 844, the Court said:

“It should be noted that the terms ‘creditor’, ‘judgment creditor’, and ‘execution creditor’, each have their special meaning * * * A judgment creditor may be said to be one whose claim has been merged into a judgment against his debtor and under which, generally, execution may be had. Anderson’s Dictionary of Law, p. 292 An execution creditor is one, who having recovered a judgment against the debtor for his debt, has also caused an execution to be issued thereon. Black’s Law Dictionary (2d Ed.) p. 297.”

The California Code of Civil Procedure, Section 664 provides with regard to judgments as follows:

“* * * in no case is a judgment effectual for any purpose until entered.”

The appellant became a judgment creditor of Everett and McEachern when his judgment was entered on March 11, 1944, for it was at that date that his status as a creditor merged into a judgment against his debtors. To say that one cannot be a judgment creditor until he has levied on a particular asset of his debtor, is equivalent to saying that a creditor needs

first to hold or seize an asset of his debtor to be classed as a "creditor."

In *Underwood v. U. S.*, Cir. 5, 18 Fed. (2d) 760, the Circuit Court held at page 761 that the tax lien was superior to the lien of an unrecorded Deed of Trust. At page 761 the Court said:

"In a well considered opinion, reviewing Texas and Federal authorities, the District Court held that the United States was a creditor, *that the trust deed was void as to creditors until recorded*, and therefore the tax lien was superior to the unrecorded mortgage lien." (Emphasis ours.)

This case was cited by the District Court in its memorandum decision. (Transcript of Record, page 8, 3rd line from the bottom of the page.)

A reading of *Underwood v. U. S.*, 37 Fed. Supp. 824, the same case in the District Court shows the basis of the Circuit Court's decision. The District Court said:

"Article 6627 of the Revised Civil Statutes of Texas for 1925 provides in part as follows: 'All bargains, sales, and other conveyances whatever, of any land * * * and all *Deeds of Trust and Mortgages shall be void, as to all creditors* * * * unless they shall be acknowledged or proved and filed with the Clerk to be recorded as required by law.' " (Emphasis ours.)

and at page 826 the Court said:

"*The Texas Statute makes absolutely void an unrecorded Deed of Trust as to creditors.* The United States was a creditor of the taxpayer within the purview of the Texas statute. (Emphasis ours.)

SUMMARY.

Before 1913 the Government had a lien as against all property of a taxpayer from the time its assessment list was received by the collector. Thereafter, Congress saw fit to create a condition subsequent wherein certain classes of persons were given priority over the lien of the government unless the government, prior to the creation of their status as one of the class, had filed notice of its lien in the place authorized by State or Territorial laws.

In this case appellant's judgment was entered March 11, 1944. The plain meaning of the words "judgment creditor" must mean a creditor whose claim is reduced to judgment. There is no authority known to this writer which holds that a judgment creditor within the meaning of Section 3672(a) requires anything more than the entry of the judgment. There is authority that the language has no further meaning than that a creditor who merely reduces his claim to judgment comes within the protection of Section 3672(a).

Dated, Berkeley, California,
July 28, 1947.

Respectfully submitted,

BERNAL & BERNAL,

Attorneys for Appellant.

No. 11,628

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD MILLER,

Appellant,

vs.

BANK OF AMERICA, N. T. & S. A., UNITED
STATES OF AMERICA and GEORGE C.
WELDEN, an individual doing business
as Wholesalers Adjustment Bureau of
San Francisco,

Appellees.

On Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

THERON LAMAR CAUDLE,

Assistant Attorney General,

HELEN R. CARLOSS,

A. F. PRESCOTT,

NEWTON K. FOX,

Special Assistants to the Attorney General.

FRANK J. HENNESSY,

United States Attorney,

WILLIAM E. LICKING,

Assistant United States Attorney.

FILED

OCT 8 1947

PAUL P. O'BRIEN,

CLERK

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No. 11,628

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

EDWARD MILLER,

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VS.

BANK OF AMERICA, N. T. & S. A., UNITED
STATES OF AMERICA and GEORGE C.
WELDEN, an individual doing business
as Wholesalers Adjustment Bureau of
San Francisco,

Appellees.

On Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The memorandum decision and the findings of fact
and conclusions of law of the District Court (R. 8-18)
are unreported.

JURISDICTION.

This is an appeal by Edward Miller from a decree
(R. 19-21) of the District Court in an action of inter-
pleader and for declaratory relief brought by the

Bank of America, National Trust and Savings Association, plaintiff, against the United States of America and others as conflicting claimants to a fund of \$3,199.59 on deposit with the Bank in the Healdsburg Branch, located at Healdsburg, Sonoma County, California, to the credit of Lyle B. Everett. (R. 10.)

On September 7, 1944, by order of the District Court, the fund was deposited with the Clerk of the Court to abide the result of the action. (R. 10.)

On October 15, 1945, on motion of the Bank, default of the defendants Lyle B. Everett and Joseph L. McEachern was granted for failure to file answers. (R. 10.)

On motion of the Bank for an interlocutory decree of dismissal it was dismissed from the action leaving pending a motion for an order allowing its attorneys' fees and costs. (R. 10.)

On July 15, 1946, the case was tried to the Court sitting without a jury (R. 9) on a stipulation and amended stipulation of facts (R. 2-8).

The United States was a necessary party defendant on account of tax liens and notices of liens filed of record, according to law, with the County Recorder for Sonoma County, California, for unpaid withholding and social security taxes in the principal sum of \$3,281.95 plus interest and penalties (R. 12-13), pursuant to the provisions of Sections 3670, 3671 and 3672 of the Internal Revenue Code.

By decree filed April 3, 1947 (R. 19-21), the District Court awarded the Bank \$200 attorneys' fees and its

costs to be taxed and to the United States the remainder of the fund of \$3,199.59. On May 5, 1947, within three months, a notice of appeal was filed by Edward Miller. (R. 21-22.)

The jurisdiction of the District Court was invoked under Section 24, Fifth and Twentieth, of the Judicial Code, as amended. This Court has jurisdiction upon appeal to review a final decision of the District Court under the provisions of Section 128 (a) of the Judicial Code, as amended.

QUESTION PRESENTED.

Did the District Court err in holding that the lien of the United States for taxes, which was perfected prior to any lien or levy by execution on personal property by a judgment creditor but after entry of judgment, took priority and was superior?

STATUTE INVOLVED.

Internal Revenue Code:

SUBCHAPTER B—LIEN FOR TAXES.

Sec. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon

all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1940 ed., Sec. 3670.)

Sec. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1940 ed., Sec. 3671.)

Sec. 3672 [as amended by Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *.

(26 U.S.C. 1940 ed., Sec. 3672.)

STATEMENT.

The facts as stipulated (R. 2-8) and as found by the District Court (R. 10-14) may be summarized as follows:

This is an action of interpleader brought by the Bank of America, National Trust and Savings Association (hereafter referred to as the Bank), against conflicting claimants to a fund of \$3,199.59 on deposit in the Healdsburg Branch of the Bank located at Healdsburg, Sonoma County, California, to the credit of Lyle B. Everett. The fund remained in the Bank until September 7, 1944, when, by order of the Court, it was deposited with the Clerk of the District Court to abide the result of the action. (R. 10.)

On October 15, 1945, on motion of the Bank, default of the defendants Lyle B. Everett and Joseph B. McEachern was granted for failure to file answers. (R. 10.) On motion of the Bank for an interlocutory decree of dismissal it was dismissed from the action leaving pending a motion for an order allowing its attorneys' fees and costs. (R. 10.)

The claim of Edward Miller¹ arises out of an action instituted against Everett and McEachern Lumber Company, a copartnership composed of Lyle B. Everett

¹Edward Miller alone appeals from the judgment below. Defendant George C. Welden has not filed an appeal. The facts relating to his claim are set out (R. 11) and the District Court's conclusions of law are set out (R. 16-17). Further reference to the claim of Welden will be omitted herein other than to point out that a writ of attachment dated November 19, 1943, was served on the Bank November 22, 1943, issued out of the Superior Court in and for the City and County of San Francisco, California. On April 20, 1944, the court rendered judgment for \$2,052.58. On April 21, 1944, the judgment was entered in the judgment book of the Superior Court in and for the City and County of San Francisco. The entry was not shown to have been prior to the notice and filing of tax liens by the United States at 10 and 11 minutes past 11:00 A.M. on April 21, 1944, with the County Recorder of Sonoma County, California. On April 25, 1944, a writ of execution, issuing under the judgment, was served on the Bank.

and Joseph L. McEachern, in the Superior Court for the County of Mendocino, State of California. On January 5, 1944, a writ of attachment for \$8,212.52 was issued and served upon the Bank. On March 11, 1944, a judgment by default was entered in the amount of \$5,052.43, plus attorneys' fees and interest and costs. On March 11, 1944, the judgment was entered on the book of judgments in the office of the County Clerk of Mendocino County, California. (R. 11-12.)

The claim of the United States is based upon \$2,520.75 for withholding tax, interest and penalties due the United States from Lyle B. Everett and Joseph L. McEachern which tax was duly assessed by the Commissioner of Internal Revenue on March 25, 1944. On March 27, 1944, the Commissioner's assessment list was received by the Collector of Internal Revenue for the First Collection District of California. On April 3, 1944, notice and demand for payment was made on the taxpayers and a warrant of distraint was issued by the Collector. On April 21, 1944, at 11 minutes past 11:00 A.M., a notice of tax lien for the tax, interest and penalties in the total amount of \$2,620.51 was filed of record with the County Recorder of Sonoma County, California. (R. 12-13.)

The claim of the United States is also based upon \$629.85 for social security tax and interest and penalties due the United States from Lyle B. Everett and Joseph L. McEachern which tax was duly assessed by the Commissioner of Internal Revenue on April 11, 1944. On April 14, 1944, the Commissioner's as-

assessment list was received by the Collector of Internal Revenue for the First Collection District of California. On April 17, 1944, notice and demand for payment was made on the taxpayers and on April 21, 1944, at 10 minutes past 11:00 A.M., a notice of tax lien for the tax, interest and penalties in the amount of \$661.34 was filed of record with the County Recorder of Sonoma County, California. (R. 13.)

The total amount due the United States from the taxpayers on account of the taxes assessed and notices filed is \$3,281.95 with interest from April 21, 1944, as provided by law, no part of which has been paid and the whole remains due and owing to the United States. (R. 13.)

On April 21, 1944, the Collector of Internal Revenue for the First District of California served a notice of levy for the taxes upon the Bank at its Healdsburg Branch at Healdsburg, Sonoma County, California. (R. 13.)

The District Court found that the reasonable value of attorneys' fees incurred by the Bank was \$200. (R. 14.)

The District Court made the following conclusions of law:

Lyle B. Everett and Joseph L. McEachern, since April 21, 1944, were indebted to the United States in the total amount of \$3,281.95 with interest from that date as provided by law. (R. 14.)

A lien in favor of the United States arose March 27, 1944, when the Collector received the Commis-

sioner's assessment list of March 25, 1944, carrying an assessment of \$2,520.75 withholding tax, interest and penalties, which lien attached to all of the property and rights to property belonging to Lyle B. Everett and Joseph B. McEachern, and particularly to the sum of \$3,199.59, belonging to Lyle B. Everett and on deposit to his credit in the Bank at Healdsburg, Sonoma County, California, and then on deposit with the Clerk of the District Court. (R. 15.)

A lien in favor of the United States arose on April 14, 1944, when the Collector received the Commissioner's assessment list of April 11, 1944, carrying an assessment of \$629.85 social security tax, interest and penalties, which lien attached to all of the property and rights to property belonging to Lyle B. Everett and Joseph L. McEachern, and particularly to the sum of \$3,199.59 belonging to Lyle B. Everett and on deposit to his credit in the Bank at Healdsburg, Sonoma County, California, and then on deposit with the Clerk of the District Court. (R. 15-16.)

On April 21, 1944, the liens of the United States upon the sum of \$3,199.59 were rendered valid when the Collector filed notices of lien in the office of the County Recorder of Sonoma County, California, and served notice of levy upon the Bank at its Healdsburg Branch in Healdsburg, Sonoma County, California. (R. 16.)

Lyle B. Everett and Joseph L. McEachern were indebted to Edward Miller in the sum of \$5,052.43, plus attorneys' fees, interest and costs from March 11,

1944, because of a default judgment entered against them, but neither the indebtedness nor the judgment constituted, as of April 21, 1944, a lien upon the sum of \$3,199.59 on deposit to the credit of Lyle B. Everett in the Bank at Healdsburg, Sonoma County, California, and then on deposit with the Clerk of the District Court. (R. 17.)

The tax liens of the United States were superior to the rights, claims and liens of the creditor defendants in and to the sum of \$3,199.59, because recorded in Sonoma County, California, prior to the effectuation of any judgment liens in the County by any of the defendants. (R. 17-18.)

The Court directed that the sum of \$200 attorneys' fees plus costs to be taxed be paid to the Bank and the remainder to the United States of America to be applied upon withholding and social security taxes due it (R. 18), and on April 3, 1947, entered a decree accordingly (R. 19-21). Edward Miller appeals. (R. 21-22.)

SUMMARY OF ARGUMENT.

Under Section 3670 of the Internal Revenue Code, if any person liable to pay any tax refuses to pay the same after demand the amount, including interest and penalties, shall be a lien in favor of the United States upon all property and rights to property belonging to such person, and under Section 3671 of the Internal Revenue Code, the lien arises at the time the assessment list is received by the Collector.

Under Section 3672 of the Internal Revenue Code, as amended, the lien becomes valid as against any judgment creditor when notice is filed in the office in which the filing of such notice is authorized by the law of the state in which the property subject to the lien is situated. The laws of California provide that notices of lien for internal revenue taxes payable to the United States be filed in the office of the county recorder of the county in which the property subject to the lien is situated.

In this case, therefore, the United States properly recorded its liens of record in Sonoma County. The burden was then on the creditor to establish a prior lien on the fund as such and the mere fact that a judgment has been entered is not, in and of itself, the establishment of a lien on personal property. Nor does an attachment, in and of itself, create a lien or establish a priority.

Under Section 674 (formerly Section 671) of the California Code of Civil Procedure, a judgment becomes a lien only upon the real property owned by the judgment debtor from the time it is docketed in the county where the property is situated.

In the case of an attachment on real property, the lien merges in the lien of the judgment. But under California law a judgment does not become a lien upon personal property even though the property is held by attachment in the action.

The decided cases establish two fundamental principles: First, that to perfect a lien on personal prop-

erty there must be a recording in the county where the property is situated; and second, that, under a judgment, there must be an execution upon personal property prior to the perfection of a lien by the United States. The judgment must be recorded in the county where the personal property is situated.

There was no intention on the part of Congress in enacting Section 3672 of the Internal Revenue Code, as amended, to give priority to anyone who merely obtained a judgment somewhere in the United States. In the case of personal property the lien of the United States recorded in the county where the personal property is situated takes priority over a judgment unrecorded in that county.

ARGUMENT.

THE LIEN OF THE UNITED STATES FOR TAXES WAS PRIOR AND SUPERIOR TO ANY LIEN OF THE CREDITOR MILLER.

This case involves conflicting claims of the United States for taxes and of an individual creditor to a fund of \$3,199.59 on deposit in the Healdsburg Branch of the Bank of America, National Trust & Savings Association, at Healdsburg, Sonoma County, California, to the credit of Lyle B. Everett, the debtor. Both claims exceed the fund in the bank. The District Court held that the lien of the United States for taxes was prior and superior to the lien of the creditor.

In that connection a brief review of the facts is important. The lien claimed by the creditor arises

out of an action instituted in the Superior Court for the County of Mendocino, California, in which a judgment by default was entered on March 11, 1944, after a writ of attachment had issued and was served on the Bank on January 5, 1944. On March 11, 1944, the judgment was entered on the book of judgments in the office of the County Clerk of Mendocino County, California. In this connection it should be noted that the judgment was recorded in Mendocino County whereas the fund on deposit was located in the Bank in Sonoma County, California. No execution was issued under the judgment and the judgment was never recorded in Sonoma County, California. No seizure of the fund was made by the creditor but the money remained in the Bank until the action of interpleader was filed by the Bank at which time the Bank paid the amount on deposit to the Clerk of the District Court as custodian.

The taxes were assessed by the Commissioner on March 25 and April 11, 1944, and the assessment lists were received by the Collector on March 27 and April 14, 1944. The liens of the United States were filed of record with the County Recorder of Sonoma County, California, on April 21, 1944, after notice and demand for payment had been made on the taxpayers. On April 21, 1944, the Collector of Internal Revenue served a notice of levy for the taxes assessed in the amount of \$3,281.95 upon the Bank at its Healdsburg Branch, Sonoma County, California. Under these facts the District Court correctly held that the liens of the United States were rendered valid on April 21,

1944, when the Collector filed notices of lien in the offices of the County Recorder in Sonoma County, California, and served notice of levy upon the Bank at its Healdsburg Branch in Sonoma County, California, and were superior to any lien of the creditor.

Under Section 3670 of the Internal Revenue Code, *supra*, if any person liable to pay any tax refuses to pay the same after demand the amount, including interest and penalties, shall be a lien in favor of the United States upon all property and rights to property belonging to such person, and under Section 3671 of the Internal Revenue Code, *supra*, the lien arises at the time the assessment list is received by the Collector.

Under Section 3672 of the Internal Revenue Code, as amended, *supra*, the lien becomes valid as against any judgment creditor when notice is filed in the office in which the filing of such notice is authorized by the law of the state in which the property subject to the lien is situated. The laws of California provide that notices of lien for internal revenue taxes payable to the United States be filed in the office of the county recorder of the county in which the property subject to the lien is situated.²

In this case, therefore, the United States properly recorded its liens of record in Sonoma County. The

²11 Deering's General Laws of California (1937) 3850-3851:

Act 8487. *Notices of Liens for Internal Revenue Taxes.*
[Stats. 1923, p. 1124.] * * *

§ 1. *Notices, etc., may be filed.* Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the county recorder of the county or counties within which the property subject to such lien is situated.

burden was then on the creditor to establish a prior lien on the fund as such and the mere fact that a judgment has been entered is not, in and of itself, the establishment of a lien on personal property. Nor does an attachment, in and of itself, create a lien or establish a priority. *MacKenzie v. United States*, 109 F. 2d 540 (C.C.A. 9th).

Under Section 674 (formerly Section 671) of the California Code of Civil Procedure,³ a judgment becomes a lien only upon the real property owned by the judgment debtor from the time it is docketed in the county where the property is situated. *Cook v. Huntley*, 44 Cal. App. 2d 635, 112 P. 2d 889; *Lisenbee v. Lisenbee*, 42 Cal. App. 567, 569, 183 Pac. 862; *Wolfe v. Langford*, 14 Cal. App. 359, 362, 112 Pac. 203.

In *Cook v. Huntley*, *supra*, it was held that the lien of a judgment attaches only to real property in which the judgment debtor has a vested legal interest and not personal property. The Court said (p. 641):

The lien of a judgment only attaches to real property in which the judgment debtor has a vested legal interest. (Code Civ. Proc., sec. 674; *People v. Irwin*, 14 Cal. 428.) It will not attach

³The Code provides:

§ 674. An abstract of the judgment or decree of any court of this State, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire. * * *

to a mere equitable interest of the judgment debtor in real property (*Belieu v. Power*, 54 Cal. App. 244 [201 Pac. 620]; *Poindexter v. Los Angeles Stone Co.*, 60 Cal. App. 686 [214 Pac. 241]) nor to an estate for years. (*Summerville v. Stockton Milling Co.*, 142 Cal. 529 [76 Pac. 243].)

A judgment creates no lien on the personal property of the debtor under the laws of California. Section 674, California Code of Civil Procedure; *Bagley v. Ward*, 37 Cal. 121, 131.

In *Wolfe v. Langford*, *supra*, it was held that neither an attachment nor a judgment is an instrument within the meaning of Section 1107 of the Civil Code and an unrecorded deed was held to take precedence over an attachment or a judgment. The same ruling was also made in *Davis v. Perry*, 120 Cal. App. 670, 8 P. 2d 514.

In the case of an attachment on real property, the lien merges in the lien of the judgment. *Bagley v. Ward*, 37 Cal. 121, 131; *Brun v. Evans*, 197 Cal. 439, 241 Pac. 86; *Balzano v. Traeger*, 93 Cal. App. 640, 643, 270 Pac. 249. But under California law a judgment does not become a lien upon personal property even though the property is held by attachment in the action. *Balzano v. Traeger*, 93 Cal. App. 640, 643, 270 Pac. 249; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 540-541, 76 Pac. 243.

Thus the situation is entirely different in respect to personal property held by attachment. In such a case the judgment does not become a lien upon the

personal property despite the attachment but the lien of the attachment continues after judgment to allow the issue and levy of execution under the judgment and the judgment alone can be enforced against the property. That principle is clearly stated in the *Balzano* case, *supra*, where the Court said (pp. 643-644):

The judgment does not become a lien upon personal property even though the property is held by attachment in the action (*Bagley v. Ward, supra*), but the lien of the attachment continues after judgment to preserve the lien and its priority and to allow the issue and levy of the execution under the judgment (6 Cor. Jur. 271), and the judgment alone can be enforced against the property. (Sec. 681, Code Civ. Proc.; *Pease v. Frank*, 263 Ill. 500 [105 N.E. 299].)

Respondent's first contention is that section 674, so far as it relates to any lien of attachment, has application only to the lien of any attachment upon real property which merges into the judgment in the action; and, that if the legislature, in adopting the legislation, intended to include and cover the lien of any attachment upon personal property the titles of the acts adopting or amending sections 671 and 674 of the Code of Civil Procedure, would have been so worded as to embody some reference thereto.

The Court so held and concluded that Section 674 of the Code of Civil Procedure, so far as it relates to any lien of attachment, has application only to the lien of an attachment upon real property and does not relate to or effect a lien on personal property.

In the *Summerville* case, *supra*, it was held that a leasehold estate for a term of years was personal property and was not subject to the lien of a judgment upon real property. Therefore it was concluded that no lien can be acquired under a judgment until the levy of execution, or, if there be no levy, a sale under execution or at all events not prior to the notice of sale. The Court said (pp. 540-541):

The claim of the plaintiff that no formal levy was necessary upon the growing crop nor upon the leasehold interest is, by reason of the proposition which we have just considered, necessarily untenable. It may be conceded, as was decided in *Lenhardt v. Jennings*, 119 Cal. 192; *Bagley v. Ward*, 37 Cal. 121; and *Blood v. Light*, 38 Cal. 654, that the levy of an execution is not necessary where the judgment itself constitutes a lien upon the real property which is the subject of the execution sale. But, as we have seen, the judgment in this case did not constitute a lien upon the property sold, and as there was no levy, it follows that the sale, if otherwise valid, took effect upon the day of its date, and not before, or, at all events, not before the notices of the sale were posted (see *Lenhardt v. Jennings*, 119 Cal. 192), and that the right of the plaintiff began upon one or the other of those dates, and is subsequent and subject to the right of the mortgagee. We think, therefore, that there was no lien upon the leasehold estate of Stuart in favor of the plaintiff until the sale took place or the notices were posted, which was several weeks after the execution of the mortgage to Hewlett, and consequently that, so far as that question determines his right,

Hewlett had the superior right to the possession of the wheat in controversy, so far as that possession may be necessary to protect his lien thereon for the payment of the debts aforesaid.

See also *Lean v. Gibbons*, 146 Cal. 739, 742-743, 81 Pac. 128.

In *Dam v. Zirk*, 112 Cal. 91, 44 Pac. 331, it was pointed out that a docketed judgment is not necessarily a lien, and in *Davis v. Perry*, 120 Cal. App. 670, 8 P. 2d 514, it was held that the recording of a judgment against the grantor did not make the previously executed, but later recorded, deed subject to the judgment lien where the deed was recorded prior to any proceeding in execution or sale under the judgment. The case is of importance in showing the necessity for execution upon a judgment before the establishment of a lien is perfected.

In *Wellborn v. Wellborn*, 55 Cal. App. 2d 516, 131 P. 2d 48, it was held that where a money judgment is rendered it becomes a lien on the real property of the judgment debtor and where a judgment imposes a personal liability, as well as declares a lien, a judgment creditor may have execution on the specific property upon which the lien is declared. The Court there points out (p. 521) the distinction between the mode of executing a common law judgment for money, by the issuance of a writ of execution, and the mode of executing a decree in equity providing for a lien.

In *MacKenzie v. United States*, 109 F. 2d 540 (C.C.A. 9th), it was held that where notice of a

federal tax lien was filed, after an attachment was levied by a creditor against the taxpayer's bank deposit but before the attaching creditor obtained a judgment, the Government's tax lien took priority over the attachment.

In *United States v. Spreckels*, 50 F. Supp. 789 (N.D. Cal.), it was held that a federal tax lien, recorded in the county where the taxpayer's realty was situated prior to the time the real estate was executed upon by taxpayer's judgment creditor, was superior to any judgment lien. It was also held that where the federal tax lien was not filed in the county where the taxpayer resided, the situs of taxpayer's intangible personal property, rights previously acquired by a judgment creditor to taxpayer's intangible personal property was superior to the tax lien. In that case the Collector filed notice of tax lien in August, 1934. The United States filed suit on December 30, 1935. The defendant bank asserted an interest adverse to the claim of the Government under a judgment against the taxpayer obtained June 3, 1936, and recorded in October, 1936, and November, 1936. The bank had execution issued upon the judgment and obtained title to various properties belonging to the taxpayer on which the Government claimed it had a prior lien. The Court said (pp. 791-792):

The lien of the Government was properly recorded in Kings county and attached to the real property located there prior to the time it was executed upon by the bank. The balance of the property to which the bank makes claim under its

judgment (with the exception of certain land in Tulare county where no lien was recorded by the Government) consists of intangible personal property. Following the general rule that the situs of such property is the domicile of the owner, the Government should have recorded its lien in San Mateo county where the taxpayer resided. This was not done until 1937, after the bank had executed on such property under its judgment.

I conclude that the rights of the bank should prevail as to all property acquired under its judgment except the real property located in Kings county, upon which the United States had a valid and existing lien as against all the world, at the time execution was issued.

The above case establishes two fundamental principles. First, that to perfect a lien on personal property there must be a recording in the county where the property is situated, and second, that, under a judgment, there must be an execution upon personal property prior to the perfection of a lien by the United States. Neither of these steps were taken by the creditor claimant in the instant case. The property was situated in Sonoma County. The judgment was entered in Mendocino County and was not recorded in Sonoma County. Furthermore, no execution was issued on the fund held by the Bank after the creditor obtained the judgment and before the lien of the United States attached.

Considering the federal statute, Section 3672 of the Internal Revenue Code, as amended, it provides that

the lien of the United States shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice has been filed as authorized by the state where the property is situated. Considering the classes of persons mentioned in the statute it will be seen that mortgagees, pledgees and purchasers have possession of a property interest, the *res*. But, as shown above, a judgment creditor in California has no specific lien on personal property and, under the facts of the instant case, the creditor was not in possession of any fund or *res*. An intention by Congress to prefer an unsecured judgment creditor holding a money judgment over a secured one, the United States, can hardly be imputed to that legislative body.

The lien of the United States on the real and personal property of a taxpayer arises when the assessment list is received by the Collector under Section 3671 of the Internal Revenue Code. Where the filing of a notice of lien is required by state law the lien of the United States relates back to the date of receipt of the list by the Collector when the notice is filed. *United States v. Rosenfield*, 26 F. Supp. 433, 435-436 (E.D. Mich.).

A creditor who obtains a money judgment in an inferior court of some far-distant state should certainly not take precedence over a lien of the United States for taxes prior to the recording of the judgment in the County of California where the personal property is situated. The same rule is equally applicable as between money judgments obtained in the

various counties of the State of California. The federal statute should not be construed as giving priority to a creditor merely because he has secured a judgment in some other political subdivision where the United States has recorded its lien in the county where the personal property is situated prior to the establishment of a judgment lien against that personal property by some other creditor. The attachment lien, so called, is not really a lien, as pointed out above, but is merely notice of an *inchoate* lien. Cf. *New York v. Maclay*, 288 U.S. 290; *United States v. Texas*, 314 U. S. 480; *United States v. Waddill*, 323 U.S. 353. The lien here asserted by the appellant was never made specific prior to the filing by the United States of its lien for taxes.

The cases relied upon by the appellant are not controlling.

In the case of *United States v. Record Pub. Co.*, 60 F. Supp. 194 (N.D. Cal.) (Br. 9), the Court held that where a judgment creditor had levied on his judgment it was superior to the lien of the United States filed subsequently of record in the county.

In *Underwood v. United States*, 118 F. 2d 760 (C.C.A. 5th), affirming 37 F. Supp. 824 (E.D. Tex.) (Br. 10), the Court held that a federal tax lien was superior to a prior, but unrecorded, deed of trust and mortgage.

Manufacturers Trust Co. v. Sobel, 175 Misc. 1067, 26 N.Y.S. 2d 145 (Br. 8), was decided by the City Court of New York for New York County and we

believe the decision to be wrong in principle. However, it should be noted in that case that judgments had been obtained by the creditor, supplementary proceedings had been commenced by the service of a subpoena, with restraining clauses, upon the third party, and a receiver had been appointed before the lien of the United States had been perfected or attached to any property of the debtor. Under New York law the equitable lien obtained by a judgment creditor through service upon the third party of a subpoena containing a restraining provision is *inchoate* until perfected by the appointment of a receiver or the obtaining of an order directing the third party to pay over. *McCorkle v. Herrman*, 117 N.Y. 297, 300; *Matter of City of New York*, 165 Misc. 309, 311-313. See also *In re Vantine's Retail Stores*, 43 F. 2d 870 (S.D. N.Y.), where it was held that a third party order against a bank in supplementary proceedings did not give a judgment creditor a lien on a deposit where no receiver was appointed.

Chalmers & Williams v. Surprise, Rec., 70 Ind. App. 646, 123 N.E. 841 (Br. 9), involved the construction and application of the laws of Illinois to a contract for the conditional sale of machinery to a company which later became insolvent and a receiver was appointed. The seller claimed priority over other general creditors of the insolvent company. The Court merely held that under the law of Illinois the general creditors of an insolvent company are not execution creditors on the theory that the seizure by a receiver of machinery sold under a conditional sale contract

was in the nature of an equitable levy by the Court and fixed a lien thereon in favor of the general creditors.

CONCLUSION.

The decision of the District Court awarding priority to the Government's lien for taxes is correct and should be affirmed.

Dated, San Francisco,
October 8, 1947.

Respectfully submitted,

THERON LAMAR CAUDLE,

Assistant Attorney General,

HELEN R. CARLOSS,

A. F. PRESCOTT,

NEWTON K. FOX,

Special Assistants to the Attorney General.

FRANK J. HENNESSY,

United States Attorney,

WILLIAM E. LICKING,

Assistant United States Attorney.

No. 11,628

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD MILLER,

Appellant,

VS.

BANK OF AMERICA, N. T. & S. A.,
UNITED STATES OF AMERICA and
GEORGE C. WELDEN, an individual
doing business as Wholesalers Ad-
justment Bureau of San Francisco,

Appellees.

APPELLANT'S CLOSING BRIEF.

BERNAL & BERNAL,

212 Bank of America Building, Berkeley 4, California,

Attorneys for Appellant.

FILED

OCT 30 1947

PAUL P. O'BRIEN,

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Appellees.

APPELLANT'S CLOSING BRIEF.

ARGUMENT.

I.

THE TERM "JUDGMENT CREDITOR" AS USED IN SECTION 3672 OF THE INTERNAL REVENUE CODE, AS AMENDED, IS NOT UNCERTAIN OR AMBIGUOUS AND DOES NOT REQUIRE JUDICIAL CONSTRUCTION.

In Appellant's Opening Brief, the case of *Chalmers and Williams v. Surprise*, 70 Ind. App. 646, 123 N. E. 841, was cited and a quotation taken from it in which the terms "Judgment Creditor" and "Execution Creditor" were clearly defined. In addition to the *Chalmers* case, the following definitions may be quoted:

Bouvier's Law Dictionary (1934 Ed.), page 254.

“Creditor, Judgment—One who has obtained a judgment against his debtor, under which he can enforce execution.”

Black's Law Dictionary (3rd Ed.), page 1028:

“Judgment Creditor. One who is entitled to enforce a judgment by execution (q. v.). The owner of an unsatisfied judgment.”

It will be seen that the term “Judgment Creditor” has a well defined meaning and that in no case does its definition include the levy of execution within its meaning. As shown by the *Chalmers* case (*supra*), “Execution Creditor”, is something distinct from a “Judgment Creditor”. No case has been cited by respondent United States to the contrary. The legislation contained in Section 3672(a) of the Internal Revenue Code is intended to be remedial and should be broadly construed in favor of the classes of interests there protected.

U. S. v. Maniaci, 36 Fed. Supp. 293 (affirmed 116 Fed. (2d) 935);

U. S. v. City of Detroit, 141 Fed. (2d) 1021.

In the case of *Wood v. Deck*, 112 Fed. (2d) 740, which was a case arising under the Bankruptcy Act (U. S. C. A., Sec. 103(a)(5)) it was held that one whose claim was reduced to judgment within the provisions of that section was a “Judgment Creditor”. The section provides:

“(a) Debts of the bankrupt may be proved and allowed against his estate which are * * * (5)

Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge. * * *"

There was no requirement in the *Wood* case for a levy of execution nor does the statute require one, yet this Court characterized the claimant as a "Judgment Creditor".

II.

APPELLANT IS A "JUDGMENT CREDITOR" WITHIN THE MEANING OF SECTION 3672 OF THE INTERNAL REVENUE CODE AS AMENDED.

Appellant Edward Miller had a valid and subsisting judgment against the taxpayer which was duly entered March 11, 1944, sometime prior to the receiving of the assessment list and the filing of the notices of lien by the United States Collector of Internal Revenue. Under said judgment, appellant was entitled to enforce execution and said judgment remains unsatisfied, bringing it clearly within the definitions heretofore set out under "I" hereof. Moreover, Appellant was more than a Judgment Creditor. While the statute involved does not require the Judgment Creditor to have a lien upon the property, Appellant did, in fact, have a prior attachment on the property and such lien of attachment continued after judgment, so that execution under the judgment could be had within a reasonable time, i.e., the life of the judgment.

The question of a far distant Judgment Creditor is not involved herein.

III.

THE CASES CITED BY RESPONDENT UNITED STATES ARE NOT IN POINT IN THE PRESENT CASE.

No California case has been cited which states that the term "Judgment Creditor" means "Judgment Creditor with execution issued". All of the California cases cited deal with priorities between liens under California statutes. None of these statutes purport to give priority to a "Judgment Creditor" over subsequent lien holders. The section of the Internal Revenue Code involved herein specifies judgment creditors among the classes protected therein. As said in the case of *MacKenzie v. United States*, 109 Fed. (2d) 540 (C. C. A. 9th), at page 541 :

"The federal tax lien is entirely statutory, therefore its scope and effect are to be determined solely by the statute and the decisions interpreting it. * * *"

And, in the case of *United States v. Rosenfield*, 26 Fed. Supp. 433 (E. D. Mich.), the Court said at page 436 :

"7. The aforesaid Acts of Congress, providing the manner and form by which the plaintiff, United States of America, acquired its aforesaid tax liens upon all the property and rights to property belonging to the defendant Carl Rosenfield in general, * * * for the defendant Rosenfield's said delinquent income taxes are the su-

preme law of the land applicable to the enforcement of the Internal Revenues of the United States. Said Federal statutes are controlling here and override any provisions * * * enacted by the State of Michigan * * * which are in conflict with said Acts of Congress, and under which the defendant Morrison & Townsend asserts its conflicting right, title or interest in said shares of stock.”

The only case directly in point is that of *Manufacturers Trust Co. v. Sobel*, 175 Misc. 1067, 26 N. Y. S. (2d) 145, and in that case it was definitely decided that in order to come within the meaning of “Judgment Creditor” as used in the statute herein involved, a levy of execution was not necessary. The argument of respondent United States, on page 20 of their brief, that the case of *United States v. Spreckels*, 50 Fed. Supp. 789 (N. D. Cal.), requires that there must be a record of a lien on personal property in the county where the property is situated, obviously is not a correct statement of the law. As pointed out by respondent, the California law provides:

II Deering's General Law of California (1937)
3850-3851; Act 8487. *Notices of Liens for Internal Revenue Taxes.*

“Sec. 1. *Notices, etc., may be filed.* Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the county recorder of the county or counties within which the property subject to such lien is situated.”

By express provision of Section 3672(a)(1) of the Internal Revenue Code as amended, this provision of the California Law is binding upon the United States Government in regard to the recordation of their liens. No similar provision is made by the Federal Statute in regard to Judgment Creditors, nor has any case interpreted the California statute to apply to Judgment Creditors. By its terms, the California statute for recordation of tax liens applies solely to the recordation of tax liens by the United States.

It is argued by respondent, United States, that Congress could not have meant what it said when it gave Judgment Creditors priority over subsequently filed tax liens. However, the statute is clear and unambiguous.

CONCLUSION.

Appellant herein is a Judgment Creditor within the meaning of Section 3672 of the Internal Revenue Code as amended, and being prior in time to the tax lien of the United States, is entitled to a reversal of the judgment of the trial Court and to an entry of judgment in its favor.

Dated, Berkeley, California,
October 30, 1947.

Respectfully submitted,

BERNAL & BERNAL,

By JOSEPH W. BERNAL,

Attorneys for Appellant.

No. 11629

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELY A. TODOROW and
LEONARD A. POTOLSKI,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED
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PAUL P. O'BRIEN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Mr. Lavine: Might I make an additional motion, your Honor, on that license matter? At this time I move to strike all of the answers of Mr. Todorow, and ask that the jury be instructed to disregard the questions and answers, on the ground it is an attempt to charge the defendant with another offense not charged in the indictment, or information here, irrelevant, incompetent and immaterial; and that it is improper cross-examination and that there was nothing [598] asked on direct examination regarding the matters thus elicited on cross-examination.

The Court: Motion denied. [599]

* * * * *

Mr. Lavine: It makes this difference, your Honor, from the jury's standpoint: That it then becomes a question of fact for the jury to determine whether the intermediary [655] merely acted as a chute through which the thing was done or whether the intermediary acted independently and without that causation. In other words, then it is a different situation than was presented in the Giles case and it becomes a question of fact for the jury to determine under those particular situations; and that is what we have submitted the instruction to your Honor on, to cover what we think is the law covering that situation.

The Court: If the court gives a number of instructions on legal philosophy to the jury, when it is all said and done, why, the chances are their own notions of what caused something [656] to be done is going to be about what they understand from all

the high-sounding phrases about reasonable and probable consequences, and natural consequences, and chain of circumstances, intermediaries, intervening causes, etc. [657]

... * * * * *

: Anything in 11-H?

Mr. Lavine: Yes, your Honor. Line 10 contains the word "information" again in place of the word "statements"——

The Court: "Statements or representations?"

Mr. Lavine: That is right. And then lines from 11 on down to the balance of the instruction, we think, amends the indictment by an instruction, because it tells the jury that it is not necessary for them to find that the statements and representations were untrue in all particulars or to the [662] full extent charged, etc.

We have proposed an instruction which I submitted to your Honor so that our legal position may be clearly presented, proposed instruction No. 24, that it is incumbent upon the Government to prove the indictment as laid beyond a reasonable doubt. And we do not think it is within the power of the court, and we would have to respectfully object to such an instruction as being in effect an amendment of the indictment.

The Court: The Government must prove everything it alleges or there cannot be a conviction.

: May I have the file, Mr. Clerk?

: In each count it is alleged that the applicant "stated and represented that he would immediately start a trucking business as an individual proprie-

torship under the trade name of'' a certain trade name, "and that he was purchasing said vehicles for his own personal use or for the maintenance of said trucking business and not for the purpose of resale."

There are in effect three misrepresentations alleged in the charge, are there not?

Mr. Lavine: Yes, your Honor.

The Court: Is it your contention that the jury must find that all of those were false in order to convict?

Mr. Lavine: Yes, your Honor; I think that they must under the indictment as laid. The government did not have [663] to allege all of it, but they did.

The Court: Suppose the jury found, for example, that only it was false wherein the applicant said that he was purchasing the vehicles for his own person use and not for the purpose of resale; the other elements being present, would not that be sufficient to convict him?

Mr. Lavine: I do not believe so, your Honor, where they have laid a charge of this character. I think they are bound to prove it as laid.

The Court: Could any of it stand without all of it standing, Mr. Harrington?

Mr. Harrington: Why, certainly, your Honor.

The Court: I mean under the evidence here, could any of it stand without all of it?

Mr. Harrington: Well, yes. If the court please, for example, there the jury might decide that Mr. Todorow and Mr. Potolski are guilty of having

caused a false statement to be made, that is, namely, the statement in there "trucking" and at least which the evidence shows they stood behind them and told them to do. They might, however, on the other hand, decide that they did not cause the veterans to make the statements contained on the purchase-requisition form that they were buying it for resale.

The Court: What I thought about when I put the question to you was this: I said that you will agree that if the jury [664] finds any of those statements were false——

Mr. Harrington: And the defendants caused them to make it.

The Court: ——they would not be permitted, under the evidence here, to find that some of the others were true. In other words, if they believed that an applicant was not purchasing for his own personal use, they would also have to believe, at the same time, under the evidence here that the other statements charged were also untrue?

Mr. Harrington: Well, I do not think that would necessarily follow. [665]

* * * * *

The Court: I just wanted to raise that question while it is in my mind. I am not asking you to commit yourself to the instruction just at this point. I will start over again.

"In this connection you will undoubtedly have observed that in each of the four counts of the indictment it is alleged that the statements and representations contained in the prescribed forms were false and fraudulent [667] in sev-

eral particulars. It is not necessary for you to find that the statements and representations were untrue, or that these defendants caused such statements and representations to be made, in all particulars charged. The Government has sustained its burden of proof on this issue if you are convinced from the evidence beyond a reasonable doubt that any of the statements or representations contained in the forms was false in any material respect charged, and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false."

Mr. Harrington: That is satisfactory to the Government.

Mr. Lavine: Well, your Honor, that simply seems to me to go back to the same thing as amending the indictment. It is our position that the indictment alleges various transactions. That was the allegation that failed of the grand jury that returned the indictment. It is without the power of this court or the Government now to amend the indictment, and the instruction would in effect tell the jury that they could convict on part of the indictment and find that a certain statement of fact is true. And let us see what the foundation such a finding would have, your Honor, so that I make my position very clear to your Honor. [668] Assuming that the jury reaches a decision that one statement was true, and they reach a decision that another statement was untrue, yet by their general verdict

of guilty in this case they would be saying that all of those statements are untrue as alleged in the indictment. That is the effect of their finding of "guilty." You cannot segregate it in the verdict; it is there.

The Court: There are in effect three false statements alleged to have been caused by the defendants. Now, I take it that you would not contend that if the jury said: "Well, there are three false statements made here, two of them the defendants did not cause, but one they did, they could not convict on that one?"

Mr. Lavine: They could under your instruction.

The Court: Irrespective of that instruction, that would be legal, would it not? In other words, it would not be necessary for the Government to prove that all three statements were false and all three statements were caused to be made by both defendants in order to convict, would it?

Mr. Lavine: Under the allegations of this indictment, I think it would, your Honor.

The Court: I am willing to modify the instruction to merely limit it to tell the jury that they are not required to find that the defendants caused all but one of those statements to be made. [669]

Mr. Lavine: I do not see how the instruction can be given without altering the indictment, your Honor; and I stand on that proposition. And it invades the constitutional right of the defendants to have the Government prove its case as alleged in the indictment beyond a reasonable doubt as to the whole indictment, and not split it up for the pur-

poses of having the jury find that the whole charge in the indictment is true, even though half of it may be untrue and the other half be true.

The Court: Do you gentlemen feel that "statements and representations contained in the prescribed forms" is sufficient?

Mr. Lavine: Oh, I do not object to that portion of it.

The Court: I did not want to repeat the names of those forms.

Mr. Lavine: No, your Honor; I am not raising any petty objection like that, your Honor. I am attacking the instruction on the basic objection.

Mr. Baughn: For the record, your Honor, it is understood that I join with Mr. Lavine, I take it?

The Court: Yes. I think the Government is entitled to an instruction that the evidence need not show that every one of the statements charged was false, nor, if false, that the defendants caused every one of them to be made. It is sufficient if the jury find that one of those statements charged was false in a material particular and was knowingly [670] and wilfully caused by the defendants to be made; that that would be sufficient for a conviction on that count.

I cannot accept the view that the Government would have to have a perfect score in order to get a conviction where they allege three false statements and allege that all three were caused to be made by the defendants. It seems to me that if the Government proves one false statement and proves it was knowingly and wilfully falsely made by the

defendants, that that would be sufficient for conviction, even though the proof fell down on the other two. But your objections are in the record, gentlemen, in behalf of both defendants. [671]

* * * * *

The Court: I will modify proposed instruction 15-C to read:

“Where two persons are charged with the commission [679] of an offense, it is not necessary that the evidence show that each defendant himself committed each and every step necessary to the completion of the offense charged.”

Omit the remainder of that paragraph and Section 550 of Title 18. In the last paragraph I will quote from 550 and end up with the paragraph:

“Every person who thus knowingly and willfully participates in the commission of an offense is held to be guilty of that offense.”

Mr. Lavine: Well, we maintain our position in objection to the instruction as amended, your Honor. Your Honor has created a conspiracy charge here which we do not think is charged by the indictment. You have charged them both now with joint participation, and inferentially, at least, led to a situation which is, for practical purposes, a conspiracy.

The Court: Did there not used to be a song about “If I gave him the moon, he would cry for the sun?”

Mr. Lavine: I do not remember, your Honor, but that was not what I was asking for. I was only

asking for an instruction that I felt would do justice to my defendants.

Now 15-E, your Honor, I respectfully ask that it be removed. We have no desire to have that instruction given.

The Court: 15 what? [680]

Mr. Lavine: E.

Mr. Harrington: If the court please, that is a proposed Government's instruction. We have some concern in the matter.

Mr. Lavine: I thought that was the court's own instruction.

The Court: Well, the Government proposed one along that line, but if the defendant does not wish it—that is the instruction which limits the effect of evidence of other alleged acts of similar nature—I want the instruction to go in the record and show that the court proposed to give it and, at the request of the defendants, the instruction was not given.

Mr. Lavine: I want that to go in the record, your Honor. In fact, I would respectfully ask that the whole proposed instruction be in the record, be copied, so that the court reporter, if the occasion would arise, could include them in a transcript on appeal.

The Court: I can't do that. That clutters up the record too much. But, Mr. Reporter, will you copy instruction 15-E into the record at this juncture?

Mr. Clerk, will you hand that to the reporter? And, Mr. Reporter, your record will show as to

that instruction that the court proposed to give it and the defendants expressly requested the court not to give it. [681]

(The specified instruction is as follows:)

“There has been admitted in evidence in this case certain testimony as to alleged similar acts of the defendants claimed to have occurred prior to the time charged in the indictment.

“Evidence that an act was done at one time or on one occasion does not constitute evidence that a similar act was done at other times or on other occasions. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any of the offenses charged in the four counts of the indictment.

“Nor may such evidence of another alleged act of a like nature be considered for any other purpose, unless the jury first finds from the other evidence in the case that the accused committed the particular offense charged in the count under deliberation.

“If the jury finds from other evidence in the case that the accused did the acts charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature in determining the intent with which the accused committed the acts charged in the particular count. And the jury may infer guilty intent from [682] evidence as to an alleged earlier act of a like na-

ture, if the jury finds that such alleged earlier act is established by evidence which is clear and conclusive.”

Mr. Lavine: Now, as to each of these instructions which we have discussed here, your Honor’s decision not to put them in the reporter’s transcript, but will your Honor file a copy with the clerk?

The Court: The originals of all requested instructions are on file.

Mr. Lavine: Including your Honor’s?

The Court: Oh, my instructions are always filed.

Mr. Lavine: Very well. So that we would have a record of what we are talking about here. Otherwise, we are talking——

The Court: I am going to file the instructions as given.

Mr. Lavine: How about the proposed instructions which we are discussing now?

The Court: I will file the instructions requested by both parties and I will file the instructions as given.

Mr. Lavine: I have no other suggestions on the court’s proposed instructions. I do request each and all of the instructions which I proposed be given.

The Court: Irrespective of whether they are covered in the instructions to be given?

Mr. Lavine: Oh, no. If they are covered, I do not want them. I only know of one instruction, however, that was [683] covered the way I submitted it.

The Court: Those last paragraphs you put on

your instructions make them rather fatal, Mr. Lavine. I think everything you have requested is covered. I believe it is.

Mr. Lavine: Well, let's see, your Honor, and we will take this up so that my record may be clear.

The Court: Your record is clear. The original instructions requested are on file. You object to the court's failure to give any one of them that is not given.

Mr. Lavine: That is correct.

The Court: That is clear.

Mr. Lavine: But I must point out wherein we think we are entitled to have the instructions given, your Honor.

The Court: You do not need to point it out to me any more than the record will show and does show; and the Circuit Court is hereby advised that you have urged me to give all of those instructions and, insofar as they are not given, I have refused to give them.

I have spent a great deal of time on these instructions, and I think we have spent too much time here this afternoon particularly.

* * * * *

Mr. Lavine: Your Honor, in making my motions for judgment of acquittal I omitted renewing my motion on the ground the indictment did not state an offense against the laws of the United States on the grounds we have stated. I will urge a renewal of that motion, if I might be permitted to do so.

The Court: That ground may be deemed to have been one [690] of the grounds made upon the close of the Government's evidence, and again upon the close of all the evidence, on behalf of both defendants in support of the motion for judgment of acquittal. [691]

No. 11629.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

FILE

MAY - 7 1948

PAUL P. O'BRIEN,

CLERK

MORRIS LAVINE,
620 Bartlett Building, Los Angeles 14,
Attorney for Appellants.

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IN THE

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

Jurisdiction is conferred by Title 28, Sec. 225, U. S. C., and Title 18, Sec. 80, U. S. C.

This is a criminal appeal. Appellants were sentenced on May 9, 1947 [R. 42] and filed notice of appeal May 9, 1947 [R. 45], within the time fixed by law.

Statutes Involved.

Section 80. (Criminal Code, Sec. 35(A).) *Presenting false claims:*

“Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United

States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; Apr. 4, 1938, c. 69, 52 Stat. 197.)”

Brief Statement of the Case.

This is an appeal from a conviction of appellants on count 4 only of an indictment, in which appellants were charged with causing one Byron N. Taylor, on or about July 11, 1946, to make false and fraudulent statements and representations in a matter within the jurisdiction of the War Assets Administration [R. 5].

Appellants are both war veterans, having served honorably in World War II. Leonard A. Potolski was with Patton's Third Army in Europe for 4 years and Ely Todorow trained as a paratrooper. They met in 1946. Potolski became a dealer in automobiles after his discharge following his return from Germany [R. 217]. He met Todorow in Albany, N. Y., after he came back from serving in General Patton's Army [R. 265].

Having heard of the sale of surplus trucks at Port Hueneme, California, they came to California and bought 25 each [R. 268]. Thereafter it became necessary for them to have the trucks driven away and they hired various drivers to do so. They were stopping at the Alexandria Hotel, where Byron N. Taylor, an ex-war veteran, also worked [R. 175]. They offered him a chance to drive away some trucks. He also sought an opportunity to buy surplus and resell it.

While the sale opened up in May with a preference to war veterans, the terms and conditions of the sale changed during different days and dates, both as to whether there was or was not a preference to war veterans. By July 2nd the local rules had changed so that there was no preference to veterans or non-veterans, but any dealers could buy on a first-come, first-served basis. This condition prevailed on July 11, 1946, the date of the alleged offense.

On that day the appellants went down to Port Hueneme with Byron Taylor, whose services they sought to drive some of the trucks away, but got down there too late. While Taylor was there he made out an application for a veteran's preference (although none was on that date necessary), in which he indicated that he was going to pick out six refueler tanks. The application was never used and the tanks were never purchased by Taylor or by the defendants from Taylor, but all of the papers were torn up and destroyed when an investigator for the War Assets Administration called on the appellants at the Alexandria Hotel and told them that it was not permissible for them to use the Taylor application.

On the way back from Port Hueneme, another veteran, named Gordon Lauridsen, demanded \$50.00 from the ap-

pellants for his services in having gone down to Port Hueneme that day. They gave Taylor \$20.00 for his services, although he arrived too late to drive any trucks away. Lauridsen was dissatisfied [R. 228].

Government witnesses testified that on July 11th, the date when Taylor went to Port Hueneme, not only could a person who was a veteran or non-veteran purchase any of the articles offered [R. 114] but a person who purchased trucks could resell them to anybody else [R. 124.]

From the start of the case to its conclusion the trial judge was quite irritated at the defendants, which irritation commenced even prior to their arrival, and from time to time he exhibited his prejudicial feelings toward both defendants and their counsel, as shown by his remarks and even the final instructions which he gave to the jury. We will elaborate in detail under the specification on fair trial and the denial of due process and effective aid of counsel.

Appellants specify the following errors in the record on which they rely:

- (1) The evidence was insufficient to support the verdicts. The verdicts are contrary to the law and the evidence.
- (2) The Court misdirected the jury in its instructions to the jury.
- (3) The Court was guilty of prejudicial misconduct with reference to counsel in the case in its instructions to the jury.
- (4) The Court was guilty of prejudicial misconduct in the trial of the case and denied to appellants the full benefit of counsel in violation of the Fifth Amendment to the Constitution of the United States. The appellants were denied a fair trial.

- (5) The indictment fails to state an offense against the laws of the United States.
- (6) The Court erred in denying appellants, and each of them, a bill of particulars.
- (7) The Court erred in the admission and exclusion of evidence.
 - a. The Court erred in the admission of evidence regarding a transaction with one Gordon W. Lauridsen, another veteran not named in the indictment [R. 160, 161, 165, 166, 325 and 326]. This evidence related to a transaction in which Lauridsen filed a request for a certificate with the War Assets Administration. The evidence is set up in verbatim in the brief under the heading of Omission and Exclusion of Evidence.
 - b. The Court also erred in permitting cross-examination of the defendant Ely Todorow regarding the data placed by him on his own application form for surplus property, which related to his being licensed as a dealer in the State of New York. The evidence regarding this transaction is set out verbatim and the objections thereto are set out verbatim under the heading of improper omission and exclusions of the evidence.
 - c. The Court also erred in the limitation of cross-examination of the principal Government's witness Byron Taylor, as set out in *haec verba* under the heading of Admission and Exclusion of Evidence and in reprimanding defense counsel for asking the question.
- (8) The Court erred in instructions given and refused.

I.

The Evidence Was Insufficient to Support the Verdicts. The Verdicts Are Contrary to the Law and the Evidence.

The evidence is insufficient in this, that:

A.

(1) There was no evidence of any rule, regulation or order existing on July 11, 1946, regarding which appellants made any false or fraudulent statements in a matter within the jurisdiction of the War Assets Administration, or by which they caused Byron N. Taylor to make such a false and fraudulent statement or representation.

Without proof of any regulation, rule or order, the statements which are claimed to have been caused to be made become immaterial.

(2) No prosecution can be founded on a matter within the jurisdiction of an agency of the United States unless that matter is shown actually to exist by a lawful rule, regulation or order, properly promulgated, and of which the accused has notice and an opportunity to learn thereof.

Even if a rule or regulation is charged, governing a department or agency of the United States, on which a criminal prosecution is later sought to be founded, it must be so definite and certain that any person of common understanding may know what is intended.

M. Kraus Bros. Co. v. U. S., 327 U. S. 614, 90 L. Ed. 894.

In this case the prosecution claimed (but did not prove) that there were certain rules or regulations which governed the sale of surplus property at Port Hueneme,

California, and that the appellants caused Byron N. Taylor to make statements in a veterans' application for surplus property and a purchase-requisition form, on or about July 11, 1946, at Port Hueneme, in connection with the purchase of six tank refueler trucks [R. 5-6]. (No purchases were ever made.)

The Government did not introduce any rule or regulation covering the sale of these trucks, but put on Curtis Alexander, manager of the automotive and construction equipment sales at Port Hueneme [R. 108].¹

¹Mr. Alexander testified as follows:

“Q. (By Mr. Harrington): Now referring to your testimony, you testified that that sale commenced May 20, 1946, is that correct? A. Yes.

Q. During the first period of the sale were there restrictions with respect to the sale of the trucks? To put it another way, were there certain people who could get the trucks and other people who could not? A. The trucks were offered for sale to veterans of World War II only.

Q. Commencing May 20, 1946? A. Commencing on May 20th.

Q. And subsequently were there changes in your orders with respect to whom you could sell the trucks to? A. Yes; there were changes later.

Q. Would you relate what changes occurred between that period and, say, July 15, 1946?

Mr. Lavine: Now, just a minute. I object to that as not the best evidence, irrelevant, incompetent and immaterial, not binding on these defendants.

The Court: Were these rules in writing?

The Witness: Changes, you mean, Your Honor?

The Court: Yes.

The Witness: Yes; the changes were made in writing.

The Court: Any written instructions?

The Witness: In advertising.

The Court: Did you have any writing?

The Witness: Yes.

Mr. Harrington: Maybe I can clarify the point, Your Honor, by a couple of other questions. Withdraw that question.

Q. Mr. Alexander, as head of that section at Port Hueneme, who did you work under? A. Under the Los Angeles

There were various changes made in the orders from time to time [R. 112-114]. Then the witness testified that on July 2nd, any licensed automotive dealer could buy without any preferential basis [R. 114]. The witness testified as follows:

“The Court: Would a veteran, commencing July 2nd, have any priority over an automotive dealer?”

The Witness: No, your Honor. He would be just on a first served basis. The federal government could purchase on that date, too, but no one had any priority over anyone else.

The Court: Commencing July 2nd, 1946?

The Witness: Yes, Your Honor.” [R. 114.]

While the witness referred to “existing directives” no directives or orders or regulations were introduced in evidence. Hence, on July 11th, when the alleged occurrence took place (which was never completed, as no use was made of the claimed documents) according to the witness, sales of trucks were open to any licensed automotive dealer, whether they were veterans or non-veterans.

The objective of having a veteran’s preference did not exist as of that date.

regional office. My immediate superior is Mr. Fry who is chief of the automotive and construction division equipment for this region.

Q. Were there occasions during the course of this sale that you received orders from Mr. Fry to make changes in the people and classes of people that you could sell them to?

A. Yes; there were.

Q. Were there instances that you received oral orders and other instances in which you received written orders?

A. That is correct.” [R. 110-111.]

It is respectfully submitted that, without specific proof of a regulation, order or directive, the evidence is insufficient to establish a basis for a false claim or false statement in a matter within the jurisdiction of the Government.

It would then be immaterial, and, we submit, that the rule applicable in perjury cases should apply.

Kuskulis v. U. S., 37 F. (2d) 241.

The only way of determining whether such a statement was or could be false would necessarily have to be based upon causing someone to make a statement, which was material and germane to the particular issues and which was necessarily contrary to a ruling or regulation.

B.

The prosecution's case is founded on a contention that there was a *preference* to veterans on *July 11, 1946*, in the purchase of trucks, and that the appellants caused Byron N. Taylor to make a statement in an application, which was contrary to the rule, regulation or directive. However, the Government failed to produce any such rule, regulation or directive and, therefore, the statements which Byron Taylor made in his application were immaterial.

There is another reason why they were immaterial, and that is that on *July 11, 1946*, according to the Government's own witness, there was no longer any preference as between veterans and non-veterans, but non-veteran dealers could purchase the trucks the same as anybody else. It was not shown that there was any necessity for any veteran to make any application, or that such application put him in any different category or position

than any non-veterans, or that there was any rule, regulation or directive which governed veterans and non-veterans.

In *M. Kraus Bros. Co. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894, the Supreme Court of the United States held that before one can be prosecuted for violating a rule or regulation, the rule or regulation must be explicit and unambiguous, and must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring criminal penalties into operation. The dividing line between unlawful conduct and lawful action cannot be left to conjecture.

In that case the regulation was published and made known in the Federal Register. The Court said:

“* * * The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick*, 299 U. S. 207, 81 L. Ed. 127.”

In the present case the regulation or directive which it is claimed provided the basis for governing the conduct of the applicant was never presented to the court or jury and, therefore, the entire basis for the prosecution as to whether any false statement was made was left to conjecture.

The sale at Port Hueneme was governed apparently solely by local procedure. It was a sale which had been arranged by the local officer and he changed his instructions from day to day, according to his own ideas and determinations. He stated that there were directives,

but none were introduced or presented in the case. Surely, a prosecution cannot be based upon a change from day to day of rules, regulations or directives, and upon an application which it was never shown was necessary or required to be made at the time of the sale involved, and which was, therefore, entirely immaterial.

No rule, regulation or directive was either introduced in evidence or read to the jury.

Corson v. U. S. (9th Cir., 1944), 147 F. (2d) 437-438;

Bailey v. U. S. (9th Cir.), 13 F. (2d) 325, 327;

Williams v. U. S., 66 F. (2d) 868;

U. S. v. Noble, 155 F. (2d) 315;

Bird v. U. S., 180 U. S. 356, 361, 45 L. Ed. 570;

Capital Traction Co. v. Huff, 174 U. S. 1, 13, 16, 43 L. Ed. 873;

Patton v. U. S., 281 U. S. 276, 288.

While in these cases there was a failure to give a full instruction to the jury on the law, in the present case there was nothing presented either in the evidence or in the instructions to the jury by which the jury could know that there was any rule, regulation or directive which required a statement of the character made by Byron N. Taylor and, therefore, there could be no basis that it was false or fraudulent, or material.

In his opening statement to the jury, Mr. Harrington, counsel for the Government, outlined his position as follows:

“The Government expects to prove as to the War Assets Administration, that one of the fundamental

objectives of their work under the rules and regulations under which they operate was to give veterans a preference.” [R. 74.]

The Government, however, failed to prove any rule or regulation which operated to give veterans a preference on July 11, 1946, the date when the transaction took place. On the contrary their own witness stated that there was no preference on July 11, 1946 [R. 114].

Curtis Alexander testified that, commencing July 2, 1946, the sale was open to non-veterans as well as veterans, and there was no prohibition against dealers reselling to anyone else, and anyone could buy on July 11, 1946, from dealers—dealers who were non-veterans could buy up to 25 units of tank refueler trucks, and could resell them at a profit [R. 124] and later on surplus trucks and material that had not been sold were offered at a lesser price to dealers [R. 128]. A large number of the trucks were sold to non-veteran dealers in July and August [R. 129].

C.

The evidence nowhere actually establishes that the defendants, or either of them, caused Byron N. Taylor to make a false statement or representation within the jurisdiction of an agency of the United States. Taylor testified that after he got into the certification shack he did not know what to put down under the question on the form he was writing as to “Description of Enterprise.” He said he then referred to Mr. Todorow. He walked

over to him and asked him as to what business he ought to put down.

“The Court: And what did he say?

The Witness: He said that there was no question as to what business I was going in and that anything would be sufficient.” [R. 184.]

The witness did not claim that Potolski told him *anything*.

The evidence of appellant Potolski was that he never was in the certification shack at all when Mr. Taylor was in there [R. 229]. This is corroborated by Mr. Wrabek [R. 158]. Appellant Todorow also denied that he was in the shack or that he told Mr. Taylor to make any false statement [R. 295]. He testified that Taylor never bought any of the trucks for which he sought the certification, and that none were acquired; that at that time it was possible for him to have bought the trucks from other veteran dealers for \$25.00 profit [R. 294]. The sales at that time were open to anybody, veterans or non-veterans, on a first come, first served basis [R. 281]. It was the understanding that if any of the refueler tanks or trucks were ultimately bought, Taylor was to get \$25.00 a truck, the same as any other dealers were receiving [R. 252].

On the basis of this evidence, there is nothing to show that the appellants or either of them caused Taylor to make a *false* and *fraudulent* statement to the Government or that they told him to make the statements he made.

Taylor's testimony is contradicted by Wrabek. Referring to Lauridsen and Taylor, Wrobeck said:

"They both entered the office; they both made out the applications and they came up to my desk together. And when I questioned Lauridsen, I thought there was probably something—

The Court: * * * What was said? A. Well, he was unable to answer my questions properly and Mr. Taylor was prompting him, and that is why I brought up the question: 'Are you two partners?'

* * * * *

The Witness: And if you are partners, only one can do the buying." [R. 167.]

At no time did Wrabek or any stenographer or employee hear the defendant Todorow say anything to them or tell them what to say.

QUANTUM OF PROOF.

There is no corroboration whatsoever of Taylor's statement. Like perjury, in a case of this kind there ought to be two witnesses; otherwise a person who claims he himself made false statements can by his mere oath transfer his own culpability to someone to whom he is seeking to shift the responsibility in order to himself escape. The indictment did not jointly charge Taylor and appellants, but charged appellants alone.

The case is somewhat similar to that of Mrs. Sykes in *Sykes v. U. S.*, 204 Fed. 909, wherein the court quoted Wharton on Criminal Evidence, 9th Ed., Sec. 422, point-

ing out that a person like Taylor could by his mere oath transfer conviction to another. Here the court said regarding some of the stolen mail sacks which were recovered in the mail robbery, and which Mrs. Sykes claimed to have seen at a given location, and which she blamed others for the situation, as follows:

“Witnesses testified that after she made this affidavit they went to the place where she testified Sykes threw the gunny sack and found one there, and this testimony is claimed to be corroborative of her evidence. But it is not so, because it does not identify or connect Sykes with the mail bag, or the gunny sack, or the crime as the perpetrator thereof, and that is the only part of her bag-hiding story that was material to the issue cited. She may have placed the gunny sack there herself, some stranger may have done so, and she may have seen it there on some of her rides. Burnhardt, who she says procured the gunny sack, may have hidden the mail bag and thrown the gunny sack where it was found, and he may have told her that he did so, or she may have seen him do it. The fact that the mail bag and the gunny sack were found where she said Sykes placed them, while it tended to show that this confessed criminal knew where the gunny sack was placed, had no more tendency to prove that Sykes put them there than it had to prove that any member of the jury, or any other innocent man did so.”

See, also, *Dahly v. U. S.*, 50 F. (2d) 37 and 17 Corp. Jur., Secs. 3594-3596; *U. S. v. Murphy* (D. C.), 253 Fed. 404; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Green v. State*, 6 Okla. Cr. 585, 120 Pac. 667; *Stanford v. State*, 16 Okla. Cr. 107, 180 Pac. 712; *Mickle v. U. S.*, 157 Fed. 229 (C. C. A. 8); *State v. Moe*, 68 Mont. 552, 219 Pac. 830; *State v. Wilson*, 76 Mont. 384, 247 Pac. 158; *Cooper v. State*, 130 Miss. 288, 94 So. 161; *McGinnis v. U. S.*, 256 Fed. 621.

It is also similar to the case of perjury where the United States Supreme Court has upheld the two-witness rule necessary to establish perjury. Otherwise, as Blackstone points out, a perjurer could by his mere oath involve someone else in his own misdeeds.

In *Weiler v. U. S.*, 323 U. S. 606, 89 L. Ed. 495, 498, the Supreme Court said:

“* * * we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely ‘upon an oath against an oath.’”

This is basic in the law of our jurisprudence and the mere statement of Taylor should not be sufficient as a matter of law for him to transfer the guilt of his claimed acts to the appellants on his mere oath.

In any event, as of the date of the Taylor transaction it was entirely immaterial whether Taylor bought or some dealer not a veteran bought, as all were privileged to buy and sell under the admitted testimony. There was

no further use made of the statement or application, and the matter ended there.

The evidence was also insufficient in this respect, that nowhere is there any evidence that the transaction was a matter within the jurisdiction of an agency of the United States. The matter seems to have been assumed, but never proved. Curtis Alexander testified that he was an employee of the War Assets Administration, but nowhere is there any evidence that the sale took place or or was a part of a transaction within the War Assets Administration of the United States. This was an essential fact to be proven by the Government. The proof is entirely lacking and there is a fatal variance. Sales were being made of surplus property by private persons and at private places; also by various governmental agencies independent of W. A. A. There is nothing to show that the particular transactions were under the jurisdiction of the United States.

For the foregoing reasons the trial court should have granted the motions for judgment of acquittal at the close of the government's case and at the close of the defendants' case and upon motion after verdict, and erred in denying these motions.

This Court should therefore either enter judgment of acquittal, or should direct the trial court to do so now, as it was its duty to do at the time of trial under the state of the evidence and the lack of proof of guilt.

II.

The Court Erred in Instructions Given and Refused.

The Court erred in giving the following instructions to the jury, which were vigorously objected to:

“In each of the four counts of the indictment it is charged that certain statements and representations contained in the ‘Veterans’ Applications for Surplus Property’ and the ‘Purchase-Requisition Forms’ were false and fraudulent in several particulars. **It is not necessary for the Government to prove that such statements and representations were false in all the particulars charged, or that the defendants caused every such statement and representation to be made as charged.** If you are convinced beyond a reasonable doubt that from the evidence as to each count **that one or more of the statements of representations charged in each count was false as charged,** and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false, the Government’s burden of proof in this regard has been sustained.” [R. 345-346.]

This instruction was objected to during the period prior to the jury retiring and renewed again after the Court had given the instruction. This instruction was erroneous.

Kramer v. U. S., 325 U. S. (Footnote 45):

Stromberg v. California, 283 U. S. 359, 368, 75 L. Ed. 117, 1122;

Williams v. North Carolina, 317 U. S. 287, 292, 87 L. Ed. 279, 282.

The Court erred in connection with the instructions given and particularly with reference to an instruction that it was only necessary for the Government to prove one alleged misstatement, although several were charged in the count in the indictment.

Where an offense of making a false statement is charged, *in solido*, it is incumbent upon the Government to prove the charge in its entirety and part of it cannot be separated from the rest.

Welsh v. State, 88 Tex. Criminal 346, 227 S. W. 301.

There is a general principle of law also on which this necessarily rests, that in a situation such as this the verdict might not be unanimous, because four jurors might have believed that a defendant caused one statement to be made, four jurors might have believed that a defendant caused another statement to be made, but none of the jurors agreeing that a defendant caused the particular statement to be made upon which guilt might rest.

People v. Meraviglia, 73 Cal. App. 402.

The Court erred in giving the following instruction:

“* * * Statements and arguments of counsel, and stage-play and acting and flirting with the jury by counsel are not evidence in the case. * * *”
[R. 339.]

After the Court gave this instruction to the jury, the following took place:

“Mr. Lavine: Yes, sir. The other instruction Your Honor amplified, the instruction at page 13, beyond what Your Honor tendered to us prior to instructing the jury.

The Court: Yes. And I want the record to show, Mr. Lavine, that I did that on account of your constant flirting, your playing, your acting with the jury. That is the reason I amplified that instruction.

Mr. Lavine: There was no stage play on my part.

The Court: All right. I do not care to discuss it with you. I had that in the last case I tried, you turning around and smiling at the jury, and you did it in this case. I want the record to show it and that is the reason I told the jury that. In every case where you appear, where you carry on those tactics, Mr. Lavine, I am going to instruct the jury accordingly. I have told you and you know how to conduct yourself in a court room. You are a smart and able lawyer, and I am tired of your tactics. It does not show in the stenographic record.

I am going to start stopping you every time you appear in my court, and describe in the stenographic record the kind of remarks, the smiling, and your mock courtesy that you produce here in this court.

Mr. Lavine: There is no mock courtesy. and certainly being pleasant in the court room does not constitute stage play.

The Court: Proceed with your objections.

Mr. Lavine: I want the record to state my position in the matter, Your Honor.

The Court: Very well.

Mr. Lavine: There was no flirting with the jury; there was nothing except courtesy to the court and all persons. I try to be pleasant at all times. I do not have a serious funeral expression on my face. But this instruction was not offered to counsel prior to being given to the jury.

The Court: I am not required to offer instructions to counsel. I do it as a courtesy to counsel. The rule only requires me to advise counsel of my action upon their requests for instructions. I am not required under the rules to tell the instructions I propose to give to the jury. I do it as a matter of courtesy and furnish a counsel copies wherever possible, so they may not only hear them but they may sit down and read them and consider them. I do that as a courtesy to counsel.

Mr. Lavine: I submit there was no evidence upon which to base those instructions and respectfully except to them. Those are the two exceptions, Your Honor.

The Court: Very well, Mr. Bailiff, will you—

Mr. Lavine: Wait a minute, Your Honor. There is one other. Might I have just a moment?

The Court: You may take all the time you require.

Mr. Lavine: In order to complete my other objection, Your Honor, I now assign Your Honor's instruction No. 13, as read by you, as misconduct and ask Your Honor to instruct the jury to disregard it, so my record is complete on it.

The Court: I am telling them to disregard it. I tell them to disregard everything that the lawyers say in the court room as far as it being evidence is concerned in this case.

Mr. Lavine: No, Your Honor, to disregard Your Honor's instruction.

The Court: You want me to tell them that I was wrong?

Mr. Lavine: In giving that instruction.

The Court: In giving note to your stage play and your flirtation with the jury?

Mr. Lavine: I want Your Honor to tell them to disregard it.

The Court: No; I won't tell them any such thing. The record will show your objection. Will you bring the jury?"

The Court erred in giving the instruction as quoted and in refusing to instruct the jury to disregard it as misconduct upon the request of defense counsel. The instruction was obviously designed to affect and discredit defendants' counsel in the eyes of the jury. There was nothing that defense counsel had done at any time which warranted such a statement to the jury, and it in effect nullified the argument of defense counsel to the jury by discrediting him in the eyes of the jury.

Bollenbach v. U. S., 326 U. S. 607.

To have given the jury such an instruction was highly prejudicial and denied the defendants the full right and benefit of their counsel before the jury by discrediting defendants' counsel of their own choice in the very presence and hearing of the jury. Such action was misconduct on the part of the trial judge, promptly called to his attention, with the request that he instruct the jury to disregard his remarks, which he refused. Such procedure and proceedings denied the defendants the fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

A.

The Court also erred in refusing to give defendants' instruction No. 19, reading:

"If the intermediary or intermediaries through whom statements and representations were allegedly made were not innocent intermediaries you must find whether the acts were proximately caused by the ac-

cused or were those of the intermediary without such proximate cause. If the acts were those of the intermediary without such proximate cause you must acquit the accused.” [R. 28.]

The defendants were entitled to this instruction to determine whether Byron Taylor did those things of his own volition or whether they were proximately caused by either defendant or by both.

In this case it was necessary for the jury to determine if the witness Taylor was an accomplice as a matter of law and, if so, whether his testimony should be viewed with caution and distrust. It was also a question of fact to determine whether Taylor, who was not being prosecuted, did these things of his own accord, or whether any of the things that the appellants or either of them did caused him to do those things. In either event, the appellants were entitled to the proposed instruction and which the Court refused to give.

Screws v. U. S., 325 U. S. 91;

Bollenbach v. U. S., 326 U. S. 607;

People v. Putnam, 20 Cal. (2d) 885;

People v. Warren, 20 Cal. (2d) 103.

B.

Defendants’ instruction No. 16 [R. 27] should have been given. This instruction read as follows:

“The time when an event occurred and the presence or absence of a defendant at the place of occurrence are relevant matters for your consideration as to the guilt or innocence of the accused. Where a

prosecution witness says that an accused is present at an occurrence and the defense offers evidence that he was absent at the time and place specified all that is necessary is that such evidence raise in your mind a reasonable doubt as to the guilt of the defendant in order to justify an acquittal of such accused."

This was in effect an alibi instruction as to the appellant Potolski, who was not present in the certification shack at the time of the alleged "causing". Like any other alibi instruction which a defendant might offer, he was entitled to have it given to the jury.

People v. Morris, 3 Cal. App. 1;

People v. Waits, 18 Cal. App. (2d) 20.

Defendants' instruction No. 5 [R. 22] likewise should have been given, which read as follows:

"You are instructed that the conduct in the act of the parties subsequent to the alleged offense or offenses, if any, is relevant for the purpose of determining whether in fact the defendants committed any offense or whether an offense was in fact committed."

This related particularly to the testimony of the defendants when officers of the War Assets Administration came to them and told them that they were not supposed to purchase from veterans [R. 233], and the officers said: "No. This is just a routine check." Potolski testified "We destroyed them (referring to the papers). We never secured the trucks or never took them" [R. 234].

III.

The Indictment Fails to State an Offense Against the
Laws of the United States.

The indictment alleges false and fraudulent statements and representations in a matter within the jurisdiction of the War Assets Administration. It then alleges a matter of *authorizing* and *approving* the sale of certain surplus property located at Port Hueneme, California. It does not state that said property was then the property of the United States, or that the sale was being conducted by the War Assets Administration, an agency of the United States, or at or under the direction or auspices of the United States.

It does not state that the veteran's application for surplus property and the purchase requisition form, which were filled out by Byron Taylor, were the forms then used and required to be used by the War Assets Administration; nor that any rules, regulations or procedure required the making of such form on and as of that date; nor that that matter was within the jurisdiction of the United States, nor that the form was a correct form as required on that date, or that a purchase could not be made by any persons, veterans or non-veterans on that date for the reason set out in the application.

An accused is clothed with the presumption of innocence, and where the indictment may be construed equally consistent with innocence as with guilt no type of offense is made out.

People v. Schmits, 7 Cal. App. 330;

People v. Davenport, 21 Cal. App. (2d) 292;

U. S. v. Frankfeld, 38 Fed. Supp. 1018.

IV.

The Trial Court Erred in the Admission and
Exclusion of Evidence in This Case.

“Q. Did you read this part: ‘It is a criminal offense and a felony, to make a wilfully false statement or claim, directly * * * to any Government agency,’—did you read that? A. I didn’t read that particular paragraph.

Q. You know now that you did commit a felony at that time?

Mr. Harrington: I object to that, your Honor, There is no evidence of that.

The Court: You do not need to answer that. Put another question.” [R. 204.]

It was prejudicial error for the court to exclude the answer to this question, because (1) it went to the state of mind of the witness, and (2) his interest, his prejudice, his bias and his motive in the case.

People v. Pantages, 212 Cal. 237.

It also was important in determining that Taylor was an accomplice and to determine whether he acted of his own volition or for other reasons. If he was an accomplice his testimony had to be regarded with caution and distrust.

It will be noted that the Court chopped off defense counsel in his questioning of Taylor, the principal witness in the case in this transaction on the fundamental issue of guilt or innocence involved in it. The Court not only chopped off defense counsel, but his remark was such as to put defense counsel in a bad light before the jury. The

case comes squarely within the decision of *Sandroff v. United States*, 158 F. (2d) 623, at 629, where the Court said:

“* * * The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility. The district court emphasized its error by declaring in the presence of the jury that it was incompetent, irrelevant and wholly foreign to the issues in the case to show why Charles Ginns had not been included as a defendant in the indictment.

“The decision and opinion of this Court in *Farkas v. United States*, 6 Cir., 2 F. 2d 644, 647, is directly in point * * *.”

The Court also pointed out other cases where the right of cross-examination of a prosecuting witness is one of the broadest, to-wit: *Alford v. U. S.*, 282 U. S. 687, 692-694, 75 L. Ed. 1624.

The Court permitted the witnesses Clayton John Wrabek and Byron N. Taylor to testify to an alleged transaction had by one Lauridsen, although the transaction was not charged in any indictment, “for the limited purpose of determining the state of mind with which the defendants acted” [R. 192].

Considerable testimony was admitted regarding the Lauridsen transaction and what Lauridsen had said and done and discussed in the presence of the defendants, although Lauridsen was not produced as a witness [R. 193-200].

The Court also admitted the testimony of Wrabek regarding Lauridsen's conversations with Taylor. Wrabek did not remember Potolski being present in the certification shack. He testified that when he questioned Lauridsen "he was unable to answer my questions properly and Mr. Taylor was prompting him, and that is why I brought up the question: 'Are you two partners?' * * * And if you are partners, only one can do the buying." [R. 167.]

The Court stated that it permitted the evidence with respect to the Lauridsen transaction for the limited purpose which he had instructed the jury [R. 168].

It was prejudicial error for the Court to admit the Lauridsen transaction regarding other claimed false statements not charged in the indictment, by which under the statute testimony of other transactions could be used as the basis for attempting to find appellants guilty.

People v. Albertson, 23 Cal. (2d) 550;

Bird v. U. S., 180 U. S. 356.

"Q. By Mr. Harrington: Item No. 7 on the subpoena, Mrs. Clark, do you have that? A. Yes; Gordon W. Lauridsen. * * * It is V 33 D 34005; that is the case number; and the certificate and the application.

Mr. Harrington: And may this folder entitled 'Gordon W. Lauridsen,' containing the documents the witness just mentioned, be marked for identification as Government's next in order?

The Clerk: Government's Exhibit 7 for identification.

Q. By Mr. Harrington: Mrs. Clark, is it part of your duties as an employee of the War Assets Administration to keep the official records of that

agency? A. For the veterans' section. We have all the records for the veterans' section in our files, the applications and all.

Q. And are the records that you just produced kept in the ordinary course of business of the War Assets Administration? A. Yes; they are there in our files.

Q. And upon the receipt of the subpoena did you go to the official files of the War Assets Administration, the veterans' branch, and secure those documents? A. Yes, sir; I did." [R. 102.]

"Mr. Harrington: At this time, if the court please—

The Court: Exhibit 7 still remains for identification.

Mr. Harrington: —solely on the proof of intent, the Government now offers 7 for identification, which is the application form and the veteran's preference signed by Gordon P. Lauridsen.

Mr. Lavine: To which we object as irrelevant, incompetent and immaterial, not with ___ the issues of the case, no corpus delicti established, no proper foundation shown.

Mr. Baughn: It does not prove or disprove any issues.

The Court: Who is Lauridsen? Did he work at the hotel?

The Witness: Yes. He was another veteran working at the hotel the same time I was.

The Court: What was he doing at the hotel?

The Witness: He was a parking attendant.

The Court: What do you mean by a 'parking attendant'? A. Well, he worked in the hotel garage, your Honor, parking cars.

Mr. Harrington: Furthermore, at this time, if the court please—

The Court: Just a moment.

Mr. Harrington: I am sorry.

The Court: Was he with you in the certification shack or building?

The Witness: Yes; he was, your Honor.

The Court: Building W and Building X?

The Witness: He was in all three buildings at the same time.

The Court: All this process that you went through, he went through with you, did he?

The Witness: Yes, your Honor.

The Court: Objection is overruled to Exhibit 7 and Exhibit 7 for identification is received in evidence.

I will caution the jury again that the transaction with respect to Lauridsen, all of it with respect to Lauridsen, may be received only for the limited purpose of determining the state of mind with which the defendants acted, if you find from other evidence that they did act as charged in the indictment. The defendants are not charged in the indictment with any transaction involving a person by the name of Lauridsen." [R. 190-192.]

Further testimony regarding Lauridsen was permitted as follows:

"Q. Calling your attention to Government's No. 7 for identification, on application and certification purportedly made out by Gordon W. Lauridsen, do you know Mr. Lauridsen? A. Yes. * * *

Q. Did he accompany Mr. Taylor at the time that this application was made out? A. Yes.

Q. Will you indicate to the court and jury on that application and the priority certificate which is contained in Government's 7 for identification what parts were in your handwriting and what parts are in Mr. Lauridsen's?

Mr. Lavine: To which we object as irrelevant, incompetent and immaterial, not within any of the issues of the indictment.

Mr. Harrington: If the court please, I will connect it up by Mr. Taylor's testimony.

The Court: Very well. Overruled.

A. Items 1, 2, 6, 7, 9, Mr. Lauridsen's handwriting.

Q. By Mr. Harrington: Excuse me just a moment, Mr. Wrabeck. With respect to '(c) Description of enterprise' and the handwriting 'transporting oil' whose handwriting is that? A. Mr. Lauridsen.

Mr. Harrington: Proceed.

Mr. Lavine: May all these answers be subject to that first objection which we made as irrelevant, incompetent and immaterial?

The Court: With respect to Exhibit 7 for identification?

Mr. Lavine: Yes, your Honor.

The Court: It will be understood that the same objections are made on behalf of both defendants.

Mr. Baughn: Yes, your Honor. I join in those objections.

The Court: Overruled. Proceed, Mr. Witness.

A. Item 10. '6 Truck Oil Refueler', Mr. Lauridsen's handwriting. I placed the Government's seal and it is my signature.

Under item 18 I affixed the date stamp 'Jul 11 1946' and Mr. Lauridsen signed his name.

Under 19, all my handwriting.

Under 'Remarks:' I signed my name and affixed the date.

On Form 63, the priority, is Mr. Lauridsen's handwriting.

Q. By Mr. Harrington: Do you recall the occasion of Mr. Taylor and Mr. Lauridsen coming into your office to be certified? A. Yes.

Q. And were they certified on the date that the application form contained in Government's 6 for identification bears, on that date? A. July 11, 1946.

Q. And did you have any conversation with Taylor and Lauridsen? Did they come in together? A. Yes." [R. 156-158.]

"Mr. Baughn: * * * I also wish to make the further objection that I can't see any foundation laid for Mr. Lauridsen, any conversation made by him, as being binding on any of these defendants; and I make the objection that that portion be—well, the portion that is already in in connection with him, be stricken. And I object to the question just put on the ground that it is calling for testimony which has no bearing on the issues of this case whatsoever.

Mr. Lavine: I join in that objection on behalf of the defendant Todorow.

The Court: The objection is overruled, * * *"
[R. 158-159.]

"The Court: What is the materiality of the Lauridsen transaction? It is not in the indictment.

Mr. Harrington: It is 'other similar acts' going to the defendant's intent.

The Court: Is it offered to prove the transactions alleged in the indictment?

Mr. Harrington: Well, if the court please, I think I have to explain the situation. Taylor and Lauridsen were together at all times.

The Court: You do not need to go into that. Any evidence as to any transaction with Lauridsen, ladies and gentlemen of the jury, may not be considered by you and will not be received here as evidence tending to prove any of the transactions alleged in the indictment.

The fact that there might have been a transaction involving Lauridsen which is not alleged in the indictment is no proof that the transactions alleged in the indictment which did not involve Lauridsen ever took place. If you find from the evidence that the transactions alleged in the indictment or any of them took place, then you may consider the evidence of a transaction involving Lauridsen for the purpose of determining the intent with which the defendants acted in doing the acts charged in any count of the indictment, if you find from the evidence that they did those acts, but you may consider it for no other purpose." [R. 160-161.]

"The Court: I did not exclude the evidence as to the Lauridsen transaction. I simply told the jury—and I will tell them again—that proof of the transaction with Lauridsen does not tend to prove some other transaction. The Lauridsen transaction is not mentioned in the indictment here. These defendants are not charged with anything in connection with the Lauridsen transaction; so it could be admitted here and could only be considered by you in the event you do find from the other evidence in the case that the defendants did do the acts charged in one or more counts of the indictment. If you do find from other evidence in the case that the defendants did the acts charged, then you may consider the Lauridsen trans-

action, if you believe that evidence, in connection with determining whether or not the defendants acted knowingly and wilfully, or whether they acted by mistake or inadvertence or for other innocent reasons.

In other words, you may consider the Lauridsen transaction, if you believe the evidence as to it, in determining the state of mind with which the defendants acted, if you find from other evidence in the case that they did the acts charged in the indictment.

Mr. Baughn: Your Honor, still we would like to object to the testimony on the ground that we believe that it is incompetent, irrelevant and immaterial and has nothing to do with the charges in the indictment.

The Court: I understand that both defendants have made that objection and it is overruled.

Mr. Lavine: Yes; we join in that.

The Court: All the evidence is received as to the Lauridsen transaction for the limited purpose and for the only purpose just stated by the court to the jury." [R. 165-166.]

Motions were made to strike the testimony as to the Lauridsen transactions as not part of the *res gestae*, which motions were denied [R. 325-326].

It was prejudicial error to admit the Lauridsen transaction for the purpose of showing intent. Evidence of intent is not admissible. The Court admitted the Lauridsen transaction "for the limited purpose of determining the state of mind with which the defendants acted", but it is basic and elementary that proof of one offense cannot be based upon proof of some other offense. (*People v. Albertson*, 23 Cal. (2d) 550.) Particularly is this true in the case of a charge of making a false statement in a matter within the jurisdiction of the United States. It is no proof that one who made a false statement in one re-

spect might have made another false statement with reference to something else. Therefore, the admission of this transaction was highly prejudicial.

The Court erred in the admission and exclusion of the following evidence relating to a dealer's license number on the application of Todorow:

“Q. By Mr. Harrington: Mr. Todorow, I would like to call your attention to this exhibit, Government's Exhibit 2 which is in evidence and which is an application form. Have you seen that before?
A. Yes; I have.

Q. And did you fill that out at Port Hueneme on or about the date it bears? A. Yes; I did.

Mr. Lavine: Objected to as improper cross examination.

The Court: Overruled.

The Witness: Yes; it is.

Q. By Mr. Harrington: And the back of it?
A. Yes.

Q. Did you see this ‘Dealer License 11-135’ put on there? A. No; I didn't.

Q. Did you have a conversation with anyone at the War Assets Administration about that license number?

Mr. Lavine: Objected to as incompetent and irrelevant.

A. I don't know anything about that license number.

Q. By Mr. Harrington: Do you know whose license number that is?

Mr. Lavine: Objected to that as incompetent, irrelevant and immaterial. A. No; I don't.

Mr. Lavine: Not within the issues of this case.

The Court: Overruled.

Mr. Harrington: Did you rule, your Honor?

The Court: Overruled. Please wait until the objections are made before you answer.

Q. By Mr. Harrington: You say now you don't know whose license number that is? A. No; I don't.

Q. Is that in your handwriting? A. No; it is not.

Q. Did you tell anybody to put that down?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

A. I don't recollect anything about that part of the statement.

Mr. Lavine: Just a minute, just a minute, Mr. Todorow. Please let me get an objection in. I object to it as irrelevant, incompetent and immaterial not within the issues in this case.

The Court: Overruled.

Q. By Mr. Harrington: Now, Mr. Todorow, I will ask you if it is not a fact that that license number 11-135, contained on that application is the license number of the Ross-Ketchum Company in Saratoga, New York?

Mr. Lavine: Just a minute, I will object to that as irrelevant, incompetent and immaterial, not within the issues of this case, and assign the asking of that question as prejudicial misconduct, and ask the court to instruct the jury to disregard it.

The Court: Overruled.

Mr. Lavine: Will your Honor pass on my assignment?

The Court: Please read it, Mr. Reporter. Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. I—

Mr. Lavine: I object to that as improper cross-examination—

A. No. I don't know even who the people are.

The Court: Just a minute. Mr. Lavine, had you finished?

Mr. Lavine: No, your Honor.

The Court: Please rise to make your objections in this court.

Mr. Lavine: Yes, your Honor. I object to it as improper cross examination.

The Court: Objection overruled. Now, you may answer.

A. I don't know. I don't even know who the people are.

Q. By Mr. Harrington: Did you ever work for a company by the that name? A. I never did.

Mr. Lavine: I object to that as—will you wait until I make my objection, please? I object to it as irrelevant, incompetent and immaterial, not within the issues of this case, and assign the asking of this question as prejudicial misconduct, and ask your Honor to instruct the jury to disregard the question.

The Court: Objection overruled, the requested instruction is denied, the answer may stand." [R. 302-305.]

At the close of the case, a motion was made to strike this testimony from the record on the grounds that it was irrelevant, incompetent, and immaterial, not within the

issues, that it was prejudicial misconduct, and that it was a separate offense not on trial. The Court overruled the objections. [R. 324-326.]²

The defendants moved to strike out any testimony regarding the license number on the defendant Todorow's application [R. 261 *et seq.*]. The Court denied the motion, saying:

“* * * the Government would be entitled to show that he put materially false statements in his own application as affecting his own credibility here as a witness on the stand, in my view.” [R. 263.]

²Mr. Lavine: At this time, Your Honor, at the close of the case we again renew our motions to strike the testimony of the two defendants with reference to any questions asked of them with relation to those licenses, this New York license.

The Court: Does that include the questions asked by the juror about it a few minutes ago?

Mr. Lavine: No, Your Honor. I will not exclude any questions asked by the juror on that question as being irrelevant, incompetent and immaterial, not within the issues of the case on the act in question, which relates to another alleged offense not pertinent here, and that it was prejudicial misconduct on the part of the prosecutor to ask the question.

The Court: What is the offense? Perhaps you would be more specific. I do not see any question of any other alleged offense.

Mr. Lavine: Your Honor, if a statement was made on that application which was untrue in any form and in which the defendant is properly held responsible, it would also be a false statement in a matter within the jurisdiction of the United States and would not be this offense on trial here.

The Court: Why did he not claim his privilege, then, if he did not wish to testify in respect to it?

Mr. Lavine: I do not think he had to, Your Honor.

The Court: I did not compel him to testify with respect to anything that might tend to degrade or incriminate him.

Mr. Lavine: I make my objections, Your Honor. I have made my motion.

The Court: There was no objection made upon that ground. I heard you weakly say that you thought it was incompetent, irrelevant and immaterial. I never heard any such objection as that made. No suggestion was made to me that this defendant was being called upon to testify to something that might tend to in-

This was prejudicial error, as one cannot be impeached by the Government on testimony that the Government itself put on by way of its own direct evidence. The defendant was not on trial for what he put in his own statements. The charge of causing someone else to make a false statement in a matter within the jurisdiction of the United States could not be aided by a claim that something appeared in the defendant's own statement which the Government introduced in evidence itself and then sought to show that this particular statement was untrue.

criminate or degrade him. The only thing I saw in it was an attempt at impeachment as to what his business was. The opening statement had been made to the jury, as I recall, that he was an automobile dealer in New York.

Mr. Lavine: That is right—not he. He was an exporter and importer, as I recall the opening statement as to him, but the other defendant was an automobile dealer in New York.

The Court: And you both questioned this man, the certification clerk Wrabek, at some length about that, didn't you?

Mr. Lavine: Not as to that part, Your Honor.

The Court: Did you not ask him about who gave him the information and put those numbers in there?

Mr. Lavine: I did not. However, that is my objection, Your Honor, on that. And I also have a motion to strike on the testimony of Taylor as to the acts and conduct of Lauridsen as relating to matters of conversation, not all transactions, but of conversations which were had purportedly with Lauridsen as to other alleged transactions or dealings.

The Court: That was supposed to be part of the *res gestae* here, was it not?

Mr. Lavine: Not as to Lauridsen, Your Honor.

The Court: That conversation you are referring to is the dispute that occurred when these defendants are alleged to have bought the caterpillar and attempted to pay Lauridsen?

Mr. Lavine: Yes.

The Court: Which took place at some time in the automobile?

Mr. Lavine: Yes. The *res gestae* of this offense, Your Honor, is what happened in the certification shack, not what happened in that conversation.

Those are my motions, Your Honor.

The Court: Very well; the motions are denied."

The evidence thus admitted was highly prejudicial. The Government had introduced the application of Todorow made at an earlier date when certifications were required.

Fish v. U. S., 215 Fed. 545, 551;

Tinsley v. U. S., 43 F. (2d) 890, 893;

Hall v. U. S., 235 Fed. 869 (9th Cir.);

Bird v. U. S., 180 U. S. 356;

People v. Glass, 158 Cal. 650, 659.³

³In *People v. Glass* the Court said:

“* * * Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and to mislead them. It was improperly received, and the exception to its admission well taken.”

The Court points out:

“The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless.”

V.

The Trial Court Was Guilty of Prejudicial Misconduct Towards the Defendants, Which Deprived Them of a Fair Trial and the Effective Aid of Counsel in the Trial of Their Case.

From the very start of the case the trial judge was "touchy" toward the defendants and their counsel.

When the case was first called, present defense counsel appeared in Court and asked for a delay of only two days, as one of the defendants was ill in New York and weather and flying conditions were then bad. Present counsel told the Court that he was not familiar with the facts of the case, he was just getting into the case, and requested only two days time [R. 48-49]. This was resisted by the Government in a lengthy argument [R. 52 *et seq.*], the Court finally stating to present counsel: "You did not make the arrangement, so we won't permit you to alter the arrangement. They can answer for themselves on this situation" [R. 54].

The Court declined a continuance and ordered the case to trial the next morning. Defendant Ely Todorow flew from New York and was in court the next morning when the case was called. Present counsel presented a doctor's affidavit as to defendant Potolski being under the doctor's care and that he should continue treatments for a further short period [R. 56]. The Court ordered the case to proceed to trial. At the suggestion of the Government that they did not like to split up the case, the Court continued the case for two days on the assurance of defense counsel that he would have the defendant Potolski in Court even though he was a veteran under the doctor's care [R. 65].

The Court stated that if he was not present within the two day period his bail would be forfeited, and defense counsel assured the Court that he would do everything possible to be ready and that he would work day and night to be ready [R. 66]. This he did on the reliance that the defendants were out on bail and he would have ample opportunity to confer with them and to have their assistance in locating witnesses and in getting information.

After the trial started the Court then took time out to question the defendants about "their failure to be present here Tuesday" [R. 82]. Although defendant Todorow was present on Tuesday (having flown all night to respond to the Court's order), the Court nevertheless insisted on addressing both defendants. They described their airplane flight [R. 82-83]; but in spite of that fact and the doctor's affidavit as to the defendant Potolski, the Court without any authority at law ordered them "into custody of the Marshal for the duration of the trial" [R. 85].

Thereafter defense counsel told the Court that he had raised the question as to "whether your Honor would feel prejudiced in any way against these defendants by reason of the things that they were not responsible for, but their attorneys in New York" were responsible for [R. 86]. The Court denied that he was prejudiced against the defendants, although he had just committed them to jail. Defense counsel then told the Court that he had not given the defendants a chance to show that they personally had no responsibility for what happened and that committing defendants to jail would deprive counsel in this case of all that has to be done to adequately prepare these men in their defense [R. 87] and that the Court was depriving the defendants of a fair trial. The Government went

into a lengthy explanation of what happened, and apparently what was irking Government's counsel was that the original continuance had been arranged in Washington and not in Los Angeles. It was shown that the defendant, Potolski, who had served with Patton all over Europe, was in ill health and was being given a course of treatments [R. 94] which had not been completed. The defendants themselves did not know anything about what was going on except that Potolski was told that he could stay to take his medical treatment and get his medical care before the trial [R. 97].

The Court nevertheless kept the defendants committed for several days, and defense counsel was required to file a writ of habeas corpus and present arguments and take up considerable time which ordinarily was needed for the preparation of the case for trial, which had commenced on such short notice in so far as defense counsel was concerned.

Throughout the trial the trial judge kept pushing the trial, holding sessions, including Saturday, and the trial judge kept "needling" defense counsel in the presence of the jury, although he asserted that he had no prejudice against defense counsel because of what had happened.

Thus, during the questioning of Curtis Alexander the Court stated:

"The Court: Just ask him questions, Mr. Lavine. Let us not review his testimony. Just ask him questions.

Mr. Lavine: I am trying to clarify his previous testimony, your Honor.

The Court: Let us not talk about his testimony. Just ask him questions." [R. 123.]

Again, the Court later on said, as counsel started to question the witness about his direct examination:

“Q. By Mr. Lavine: You testified on direct examination—

The Court: Now, none of that, Mr. Lavine. Just ask him questions. * * *” [R. 126.]

In connection with the custody of the defendants, a little later on the Court said:

“The Court: In other words, your theory is that the court might lock up the jury, but is not privileged to lock up the defendants during the trial?

Mr. Lavine: Not my theory. It is the law, and I expect to show your Honor the rule and the statute that cover the subject. And that happens all the time, your Honor; jurors are locked up but defendants are not.

The Court: It is discretionary with the court, isn't it?

* * * * *

Mr. Lavine: No, sir; it is not, your Honor.” [R. 130.]

Later, regarding the locking up of the defendants during the trial, the Court made this comment:

“The Court: These defendants are not as strong as I was led to believe they should be in the opening statement you made to the jury yesterday, when you described them as members of the Third Army who followed Patton all over Europe and had been through a tough campaign in the Army. It seems to me that sleeping over in jail would be a picnic compared to some of the hardships that the men following Patton all over Europe would have sustained.

Mr. Lavine: Certainly, and the outcome of that may result in very serious consequences, Your Honor.

The Court: I have not seen any evidence of it. The defendants look very healthy to me, both of them." [R. 135.]

Defendants asked leave to file affidavits and the Court said:

"* * * I do not want any affidavits when he is here in the flesh." [R. 136.]

His questioning of the defendant Potolski [R. 137] reflected the attitude of the Court. The Court wanted the record to show that the defendants looked very well dressed, neat and clean, and stated "* * * the defendants look as neat and clean and well dressed as their counsel. That is the way they appear in court." [R. 138-139.]

The Court engaged in considerable questioning throughout the trial. While counsel were looking over a catalogue which was being shown to a witness, Government's counsel said it was a little disconcerting to have both counsel up here, and the Court stated:

"Yes. Mr. Lavine and Mr. Baughn, you will both take your seats." [R. 180.]

Again, on cross-examination of the Government's principal witness:

"Q. You know now that you did commit a felony at that time?

Mr. Harrington: I object to that, Your Honor. There is no evidence of that.

The Court: You do not need to answer that. Put another question.

* * * * *

The Court: You know better than to ask a question like that of the witness." [R. 204.]

A little later on cross-examination of the same witness:

“Q. (By Mr. Lavine): Did you have two arguments with the clerk?

The Court: Do not characterize them as ‘arguments.’ You know better than that. Ask him what was said and done.

Q. (By Mr. Lavine): You, yourself, have described it as a misunderstanding. Was it a misunderstanding or an argument? Will you tell us what it was?

The Court: Ask him what was said and done. The jury will decide whether it was a misunderstanding or an argument.” [R. 205.]

Earlier in the case the Court conducted considerable questioning of witnesses, which was objected to [R. 143]. During the testimony of the defendants themselves, the Court from time to time indulged in questioning and questioned the defendant Potolski [R. 234, 235, 244, 253, 260].

It is the practice of the Court to compel counsel to ask questions standing by the lectern in the court room. During the questioning of defendant Todorow, counsel asked the Court if he might question the witness sitting down as he was quite fatigued. The Court declined the request [R. 291], stating:

“I think it expedites matters, Mr. Lavine, to stand there and ask the questions, and perhaps it won’t be so long between questions if you are standing.”

Later on, during the making of objections, the Court said:

“You have stated your objection. And you see the rules there on the table?

* * * * *

“Objection sustained.” [R. 319.]

The rules of the trial court require counsel to stand when making objections. We do not have any objection to the rules, but cite this merely to reflect the attitude of the Court.

At the very outset of the argument to the jury, the Court immediately interrupted counsel [R. 329].

Counsel for appellant had called the main witnesses, who had testified to falsifying, "wilful liars," and "if they lie on one occasion, are you going to take their word on another occasion?" The Court in the presence of the jury told counsel not to use that word [R. 330].

The word "liar" is not an epithet. It is a statement of fact which, if the witness is to be believed, he had branded himself.

"Liar" is defined as "One who intentionally utters that which is false; especially, one addicted to lying." (Funk & Wagnalls New Standard Dictionary.)

Again, the Court said:

"The Court: Mr. Lavine, there may have been a dozen men in the certification shack. Be specific, please, and let us get along.

Mr. Lavine: I have not finished my question, Your Honor.

The Court: You know better how to ask questions than that. Proceed, please.

Q. By Mr. Lavine: Do you remember the Government official who was in charge of the certification shack? Thank you, Your Honor. I was not—

The Court: You do not need to thank me. Just proceed." [R. 202.]

"Q. Well, do you remember Mr. Wrabeck reading paragraph 18 of this Government's Exhibit 7, your application for surplus property, to you?

The Court: That is an improper question. Ask him whether he did read it to him.

Mr. Lavine. Well, I was testing his memory, Your Honor. That is the first objective.

The Court: You are assuming facts not in evidence.

Mr. Lavine: All right.

The Court: No one ever said he read it to him. There has been no testimony to that effect." [R. 203.]

In the charge to the jury the Court gave the jury an instruction that "Statements and arguments of counsel, and stage-play and acting and flirting with the jury by counsel are not evidence in the case" [R. 339].

As stated by the Supreme Court in *Bihn v. U. S.*, 328 U. S. 637:

"So read, the instruction sounds more like the comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime."

As stated in *Quercia v. U. S.*, 289 U. S. 466, 469:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. * * * The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' * * * He may not charge the jury 'upon a

supposed or conjectural state of facts, of which no evidence has been offered.' United States v. Breitling, 20 How. 252, 254, 255, 15 L. ed. 900, 902. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf."

Just as this case held it was improper for the Court to make comments which might strip the accused of the benefit of his testimony, so the accused had the right to have his own counsel not stripped of the full benefit of effective argument in his behalf. In the *Quercia* case, the judge, dealing with a mere mannersim of the accused in giving his testimony, put his own experience in the scale against the accused. In the present case the judge, dealing with his own dislike of defense counsel's smiling and pleasantness in the courtroom, which he called mock courtesy and flirtation with the jury, put all the weight that could be attached in the scale against the accused's counsel to the prejudice of the accused. This necessarily created prejudice in the minds of the jury, which precluded a fair and dispassionate consideration of the evidence.

In the argument on objections to the instructions, the Court evidenced his attitude in the matter:

"* * * You are a smart and able lawyer, and I am tired of your tactics. * * *

I am going to start stopping you every time you appear in my court, and describe in the stenographic record the kind of remarks, the smiling, and your mock courtesy that you produce here in this court" [R. 347].

The Court committed the defendants immediately upon their conviction to custody of the marshal, although he stated at first "I am ready to sentence the defendants any time they request it" [R. 352].

The Court deferred sentence and put the defendants in jail for the period he referred it to the Probation Officer, and then immediately remanded the defendants to custody of the marshal to await sentence [R. 353].

At the time of sentence Government counsel recommended fines and a jail sentence [R. 40]. The Court promptly ignored the recommendation of the Government and sentenced the defendants to the penitentiary and declined to fix bail pending appeal [R. 40].

Later, on application this Court fixed bail pending appeal [R. 363].

One of the essentials of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States is a fair trial. (*Duncan v. Kahanamoku*, 327 U. S. 304.) One of the essentials of fair trial is not only that a defendant have counsel, but that he have ample time to prepare his defense, and the uninterrupted service of counsel by a division of his work.

Glasser v. U. S., 315 U. S. 60;

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;

People v. Simpson, 31 Cal. App. (2d) 267.

Another essential is that one not only have counsel, but have the effective aid of counsel and that nothing be

done in the preparation of the trial of the case to impede counsel.

Powell v. Alabama, supra;

Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859;

Williams v. Kaiser, 323 U. S. 471, 474;

Glasser v. U. S., 315 U. S. 60, 76;

Johnson v. Zerbst, 304 U. S. 458, 468;

Waley v. Johnson, 316 U. S. 101, 104.

In this case counsel relied on the time he would have to confer with his clients outside of Court, in view of the unusual situation that developed, and he was willing to forego other matters to give him an opportunity to confer with his clients and get other necessary witnesses. It was his right to rely on the fact that the defendants who were out on bail would not be committed during the course of the trial of the case. The trial judge was confused with the rule in the State of California, but not obtainable in the Federal Court. The defendants had made every effort to return. The defendant Todorow was present and ready for trial at the time set and Potolski furnished the Court with a doctor's affidavit, which was at no time controverted or denied. When the Court continued the matter for a two-day period, he also was present in Court, even though he had been ill and was under a doctor's care.

It was, therefore, highly prejudicial for the Court to commit the defendants to the custody of the marshal and sheriff and keep them in jail during the course of the trial when their time was necessary for proper preparation of the case, and likewise it deprived their counsel of full and adequate opportunity to prepare the case for proper presentation to the jury.

Such procedure denied these defendants fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

It has been frequently held that a denial of the right of counsel of one's choice violates due process of law, and may even enable a writ of habeas corpus to run. This was held in the following cases:

People v. Alabama, 287 U. S. 45, 77 L. Ed. 58;

House v. Mayo, 324 U. S. 42, 49, 89 L. Ed. 739;

Williams v. Kaiser, 323 U. S. 471, 89 L. Ed. 398;

Rice v. Olson, 324 U. S. 786, 89 L. Ed. 1367;

White v. Ragan, 324 U. S. 760, 89 L. Ed. 1348;

Tompkins v. Missouri, 323 U. S. 485, 89 L. Ed. 407;

Avery v. Alabama, 308 U. S. 444.

It would be meaningless to give one counsel of his choice and then make it impossible for that counsel to give full and effective aid, by reason of extraneous matters of the court's own conduct.

Glasser v. U. S., 315 U. S. 60.

The whole atmosphere of the trial judge was one designed to keep counsel occupied as much as possible with matters other than those involved in the case and thus deprive defendants of the effective aid of counsel of their choice. Defendants' counsel sent his clients out on a Sunday, the only day available, to locate witnesses in their behalf [R. 296].

The Trial Court Erred in Refusing Defendants a Bill of Particulars.

A defendant in a criminal case is entitled to a bill of particulars to enable him to prepare his defense. The defendants merely asked for data regarding forms and statements which it was claimed were made, and which were confidential in the possession of the Government.

Even under the new rules, where documents are in the possession of the Government, an order for their inspection is allowed, and here the defendants requested only that data and the data regarding the persons to whom the alleged false statements or representations were made, in order that they might learn all of the facts surrounding the transaction from the witnesses available.

It was, therefore, error to deny such a request.

Glasser v. U. S., 315 U. S. 60-90, 86 L. Ed. 680;

Floren v. U. S., 186 Fed. 961;

U. S. v. Eastman, 252 Fed. 232;

Kirby v. U. S., 174 U. S. 47, 43 L. Ed. 890;

Hindmer v. U. S., 292 Fed. 679;

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Durland v. U. S., 161 U. S. 306, 315;

Case v. U. S., 6 F. (2d) 530;

Rules of Criminal Procedure, Rule 7(f).

Conclusion.

For which reasons appellants and each of them pray for reversal of the judgments and for an order directing entry of judgments of acquittal as to each defendant.

The motion for a bill of particulars was made on the day of the arraignment of the defendants.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

No. 11629

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,

United States Attorney;

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney;

PAUL FITTING,

Assistant U. S. Attorney,

600 Federal Building, Los Angeles 12,

Attorneys for Appellee.

FILED

AUG 11 1948

PAUL P. O'BRIEN,

CLERK

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No. 11629

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellants were indicted under Section 80 of Title 18 of the United States Code on November 20, 1946 [R. 2-6]. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41(2)). The offenses charged were committed in Los Angeles and Port Hueneme, within the Central Division of the Southern District of California [R. 145, 155, 183].¹ Judgment was entered on Count Four of the Indictment, the only count involved in this appeal, on May 9, 1947 [R. 41-44]. Notice of appeal was filed on May 9, 1947 [R. 45]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹References preceded by the letter "R" are to the printed record on appeal and those preceded by "A.B." are to Appellant's Opening Brief.

Statutes Involved.

Count Four of the Indictment charges a violation of Section 80 of Title 18 of the United States Code, which provides in part as follows:

“* * * whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations * * * knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”

Statement of the Case.

On November 20, 1946, the Federal Grand Jury at Los Angeles returned an Indictment in Four Counts, which was filed that day in the United States District Court for the Southern District of California, Central Division, charging appellants with causing false statements to have been made to the War Assets Administration in connection with the sale of war surplus property, in violation of Section 80 of Title 18 of the United States Code [R. 2-6]. Only Count Four is involved in this appeal, appellants having been acquitted on the other three counts. Count Four charges that appellants caused Byron N. Taylor to state in a Veteran's Application for Surplus Property, and a Purchase-Requisition Form, used in con-

nection with the purchase of six tank refueler trucks, that he was going to start an oil transporting business as an individual proprietorship under his own name and was purchasing the six trucks for his own personal use in such business and not for resale, whereas in truth he was purchasing the vehicles for the sole benefit of defendants with funds advanced by them.

Appellant Todorow pleaded not guilty to all counts on April 22, 1947 [R. 9, 63-64], and appellant Potolski pleaded not guilty to all counts on April 24, 1947 [R. 11]. Motions to dismiss the Indictment were made on April 22, and April 24, 1947, and were denied [R. 9-11, 57-63, 69-72]. A request for bill of particulars was filed and denied on April 24, 1947 [R. 11, 72].

Trial was commenced on April 24, 1947. On May 1, 1947, the jury found each of the defendants not guilty on the first three counts and guilty on Count Four [R. 35]. Motions for a new trial, in arrest of judgment, and for judgment notwithstanding the verdict, were filed on May 3, 1947 [R. 36-39], and were argued and denied on May 9, 1947 [R. 39-40].

On May 9, 1947, each defendant was sentenced on Count Four to imprisonment for two years and fined \$3,000, to be committed until the fine be paid [R. 41-44].

The Facts.

Appellant Potolski was an automobile dealer from Albany, New York [R. 214, 217]; and appellant Todorow, an export representative from New York City [R. 320]. They heard through advertising of a sale by the War Assets Administration of surplus trucks at Port Hueneme, California [R. 217, 266], and came out to California together [R. 218, 266-267, 322]. Both appellants were veterans of World War II [R. 215, 265].

The particular sale of surplus trucks here involved lasted from May 20, 1946 until August 23, 1946 [R. 110, 115]. Twenty-five units were the maximum number that could be sold to any one purchaser during the course of the sale relevant here [R. 115, 125]. Rules as to eligibility to buy were changed from time to time, but on July 11, 1946, the date involved in Count Four, the truck sale was open to so-called priority holders, *i. e.*, veterans, federal government agencies, states, counties, municipalities, etc., and to any licensed automobile dealers, whether or not such dealers were veterans, all on a first-come-first-served basis [R. 114-115, 124].

The procedure followed as to a veteran purchaser was as follows: He would fill out at Port Hueneme a form of "Veteran's Application for Surplus Property" [*cf.* Gov. Ex. 1; R. 367-8], describing the articles he wished to buy. The certification officer of the War Assets Administration at Port Hueneme, on presentation by the

veteran of the signed application and his discharge papers, would certify the application for a veteran's preference, and the veteran could buy the specified articles [R. 145-146, 153-154].

Appellants filled out applications at Port Hueneme on June 26, 1946, as veterans, and were certified for, bought, paid for, and received 25 2½ ton dump trucks each, thus exhausting their quotas [R. 146-150, 152-154, 218-220, 267-268, 298, 126-7; Gov. Ex. 1, 1A, 2; R. 367-374].

Appellants knew of the 25 unit per purchaser limit, having been told of it by Curtis Alexander, the manager of the automotive equipment sales at Port Hueneme, both in a telephone conversation before they came to California [R. 217, 266] and face to face after they arrived at Port Hueneme [R. 119]. After appellants had purchased their fifty trucks, they asked Alexander if they could buy more, and were again told that the limit was twenty-five units per person [R. 120, 122]. Appellants in their own testimony showed that they knew of this limitation [R. 217, 282].

Byron N. Taylor, the veteran involved in Count Four, was an elevator operator at the Alexandria Hotel in Los Angeles, where appellants were staying during the sale [R. 185, 226]. On about July 10, 1946, after appellants had bought their limit of fifty trucks, appellant Todorow approached Taylor and asked him if he was a veteran of World War II and would like to make \$20.00 [R. 175]. When Taylor asked how, Todorow told him that all Taylor would have to do was to come to Oxnard with him the following day and buy some trucks

for him [R. 176]. On the next day, July 11, 1946, appellants Todorow and Potolski, and Taylor, and Gordon W. Lauridsen, a parking attendant at the Hotel Alexandria [R. 191], drove from Los Angeles to Port Hueneme [R. 176-183, 227, 288]. During the trip, when questioned about the legality of the proposed transaction, Potolski stated that appellants had bought their limit of twenty-five trucks apiece, and were using other veterans' priorities [R. 177]. Taylor and Lauridsen were told they were to buy six 800-gallon refueler trucks each [R. 178, 183].

On arrival at Port Hueneme, the four went to the certification shack, where Taylor and Lauridsen filled out applications for six refueler trucks each and were certified as veterans for such trucks [R. 183, 155-158; Gov. Ex. 6, R. 376-377]. Taylor filled out the application, indicating that he was going into the business of "transporting oil" as "soon as possible" under the trade name of "Byron N. Taylor" as an "individual proprietorship" [Gov. Ex. 6; R. 376, 183]. He signed a certification on the application that he was "not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein" [Gov. Ex. 6; R. 377]. He also signed a certification on a Purchase-Requisition Form that the "vehicles I wish to purchase are for my own personal use or for the maintenance of my established business, profession or agricultural activity" [Gov. Ex. 6; R. 379, 380]. When Taylor, in filling out the application, came to the portion of the application relating to the business, he asked appellant Todorow what business he ought to put down. Todorow said "that there was no question as

to what business I was going in and that anything would be sufficient" [R. 184]. Taylor then filled out the application as stated above, though he had no intention of going into the oil transporting business [R. 185].

After the application was certified, Taylor was given a Purchase-Requisition Form [Gov. Ex. 6, R. 380]. Todorow looked it over and noted that it called for only one truck [R. 188]. He sent Taylor back to get it changed, and, when Taylor was unsuccessful, went back with Taylor and succeeded in obtaining a second purchase-requisition form for 5 additional trucks [R. 189; Gov. Ex. 6, R. 379]. Contracts for the sale of the six trucks to Taylor were made out, and were turned over to Todorow in Potolski's presence at Port Hueneme [R. 193]. On the way back, in Oxnard, Taylor was paid his \$20.00 and signed a receipt on the back of a Western Union blank [R. 194, 230]. Lauridsen was paid \$15, but refused to sign a receipt [R. 194-195, 230]. On the trip back, when Lauridsen asked why the hush-hush at Port Hueneme if everything was so legal and on the up and up, Potolski replied, "We didn't want it to look like you were buying them for us" [R. 196-197]. Potolski further stated that if anything was wrong, Taylor and Lauridsen would get it in the neck, not appellants, and that anyhow the deal was petty larceny of which nothing great would come [R. 198].

Subsequently, agents of War Assets interrogated Todorow and Potolski about their purchase of trucks through Taylor and other veterans [R. 232-233, 291-292]. As a result of the call, appellants destroyed some papers, including the contracts in connection with the Taylor purchase, and did not pay for or receive the trucks [R. 293].

ARGUMENT.

I.

The Evidence Was Sufficient to Support the Verdicts.

Appellants contend that the evidence was insufficient to support the verdicts, and that they were contrary to law and the evidence, on three main grounds: (1) that there was no false statement in a matter within the jurisdiction of a government agency, because no rule, regulation, or order governing the sale was proved, or was proved to be violated; (2) that no preference to veterans existed on July 11, 1946, and the government's case depends on such preference, and (3) that appellants did not cause the Taylor false statements to be made.

(1) Matter Within the Jurisdiction of War Assets Administration.

There is no doubt that the statements charged in the indictment to have been made by Byron N. Taylor were false, *i. e.*, "that he would immediately start an oil transporting business as an individual proprietorship under the trade name of 'Byron N. Taylor,' and that he was purchasing said vehicles for his own personal use or for the maintenance of said oil transporting business and not for the purpose of resale." Taylor himself said that he did not intend to buy the trucks for his own personal use, that he was an elevator operator, and he had no intention of going into the oil transporting business [R. 184-5]. However, appellants question whether these false statements were in a matter within the jurisdiction of a government agency.

The Surplus Property Act of 1944 (58 Stat. 765, 50 U. S. C., App., Secs. 1611-1646) was passed to facilitate

and regulate the orderly disposal of surplus property. By Executive Order 9689 (11 F. R. 1265), effective January 31, 1946, the President created the War Assets Administration and transferred to it the surplus property disposal powers previously vested in other agencies. Congress thereafter recognized the War Assets Administration in the Act of May 3, 1946 (60 Stat. 168) amending the Surplus Property Act of 1944. This amending act read in part:

“The Administrator shall prescribe regulations to effectuate the objectives of this Act to aid veterans in the acquisition of surplus property, in appropriate quantities and types, to enable them to establish and maintain their own small business, professional, or agricultural enterprises.” (60 Stat. 168.)

The amendment further required that the Administrator prescribe a reasonable time, but not less than 15 days, during which certain property should be for exclusive disposal to veterans.

War Assets Administration Regulation 2 (11 F. R. 5125), issued May 10, 1946, effective May 3, 1946, set up a scheme for disposing of surplus personal property to priority claimants, with particular preference to veterans. Section 8302.9(b) provided that, except in disposals of property to veterans to be resold in the regular course of their business, transfers to priority claimants should be “for their own use only and not for transfer or disposition by them to others, and disposal agencies may require priority claimants so to certify” (11 F. R. 5127). Sections 8302.4, 8302.5 and 8302.6 (11 F. R. 5126) set up the order of priorities and the mechanics of setting aside property to meet them. Section 8203.6(b)

provided that property in excess of that needed to care for the needs of priority claimants could be disposed of promptly to others. Section 8302.8(a) provided (11 F. R. 5126):

“A veteran desiring to acquire property set aside under §8302.4 or to exercise his priority under §8302.5 shall apply to any certifying office of War Assets Administration and shall furnish the Administration with complete information regarding the property desired. War Assets Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is for his own personal use or to enable him to establish or maintain his own small business, professional, or agricultural enterprise and shall require of the applicant a supporting statement or affidavit. War Assets Administration will issue an appropriate certificate to such veteran stating that he is a veteran entitled to purchase the types and quantities of the property described therein.”

A comparison of the requirements of these duly promulgated regulations, and particularly Section 8302.8(a), with the documents specified in the indictment—“Veteran's Application for Surplus Property” [Gov. Ex. 6; R. 376-377] and “Purchase—Requisition Form” [Gov. Ex. 6; R. 379-380]—shows that the information called for in the forms was that required by the regulations. The pertinent items in the forms are those relating to the intended use of the surplus property, which are items 4 through 7 of the Application [R. 376], and the certifications that appear on both the Application (Item 18) and the Purchase Requisition Form [R. 377, 379, 380].

The courts have found information furnished the government in analogous circumstances to be in a "matter within the jurisdiction" of the agency involved. *Fuller v. U. S.*, 110 F. (2d) 815, 817 (C. C. A. 9, 1940), cert. den. 311 U. S. 669; *United States v. Zavala*, 139 F. (2d) 830, 832 (C. C. A. 2, 1944); *Sanchez v. United States*, 134 F. (2d) 279, 283 (C. C. A. 1, 1943), cert. den. 319 U. S. 768; *United States v. Barra*, 149 F. (2d) 489, 490 (C. C. A. 2, 1945).

One case has gone even further, and has found oral statements to a government official charged generally with enforcing a law are within this phrase, without any specific regulation requiring such information. *Marzani v. United States*, 168 F. (2d) 133, 141-2 (Ct. of Ap., Dist. of Col. 1948), cert. granted 6/21/48, 333 U. S., Preliminary Print, No. 4, p. IX. In the *Marzani* case, statements by a federal employee to a superior at an informal conference to review the charges against the employee, which had led to an official request for his resignation, were held within the statute.

The facts are that the War Assets Administration did have jurisdiction of surplus property disposals, and the false statements were made on the forms used to initiate and perfect sales to veterans and covered facts essential to the sale. Even if this Court should feel that the chain of governmental authorization for requiring the statements shown in the Application and the Purchase-Requisition Form was not completely established, it is settled that where a defendant makes a false statement as to information asked of him by the government, he cannot raise as a defense in the criminal proceeding the authority of the particular agency so to act on constitutional or

similar grounds, so long as color of authority exists in the agency. *Kay v. United States*, 303 U. S. 1, 6-7 (1938); *United States v. Kapp*, 302 U. S. 214, 217-218 (1937); *Hills v. United States*, 97 F. (2d) 710, 713 (C. C. A. 9, 1938); *United States v. Meyer*, 140 F. (2d) 652, 655 (C. C. A. 2, 1944); *United States v. Barra*, 149 F. (2d) 489, 490 (C. C. A. 2, 1945); *United States v. Rubinstein*, 166 F. (2d) 249, 254 (C. C. A. 2, 1948), cert. den. 333 U. S. 868. It thus appears that there were regulations requiring the information here requested, and that this information was in a matter within the jurisdiction of War Assets Administration.

(2) Veteran's Preference.

Appellants further contend that the Government's case is founded on the existence of a veteran's preference on July 11, 1946, which was not proven (A. B. 9). Appellants misconceive the Government's case. That case is based on a false statement in a matter within the jurisdiction of a Government agency. It is clear that a false statement was made to a Government agency. Appellants by this objection are raising again, in slightly different form, the question of whether the statement was in a matter within the jurisdiction of the War Assets Administration.

Testimony as to the rules governing the particular sale here involved was given by Curtis Alexander, the manager of automotive and construction equipment sales at Port Hueneme for War Assets Administration, who was in charge of the particular sale here involved [R. 108]. The sale lasted from May 20, 1946 [R. 108] until August 23, 1946 [R. 125]. Any person eligible to buy at the

sale was limited to a total of 25 units over the entire period of the sale relevant here [R. 113, 115-116, 125].² From May 20, 1946 until June 24, 1946 the sale was open only to veterans [R. 112-113]. From June 24 until July 2, it was open to veterans and to other priority groups, such as federal agencies, state agencies, etc., the veterans being able to buy each day, but each other priority group having a separate day in rotation [R. 113-114]. On July 2, 1946, the sale was thrown open to all priority groups and to any licensed automobile dealer, all on a first-come-first-serve basis [R. 114]. Not only did Alexander testify that he told appellants of the 25 unit limitation [R. 119, 120, 122], but appellants in their testimony admitted they knew of it [R. 217, 266, 282]. Taylor, the veteran involved in Count Four, as appellants knew, was not a dealer [R. 185, 226], so he could qualify at the sale only as a veteran, as appellants intended he should [R. 175]. The Government's case does not turn on the fact that veterans had a preference, but on the fact that appellants caused false statements to be made in a matter within the jurisdiction of a Government agency. Appellants, having exhausted their quota, were not eligible to buy, so they made use of someone else—Taylor—who was in one of the classes eligible to buy, and caused him to make false statements in the buying.

It is true that evidence as to eligibility to buy at this sale was by the oral testimony of Alexander, but it was

²From May 20 to May 27 a purchaser was limited to one unit [R. 112]. From May 27 to June 10 he could buy only one of each of the items for sale, but apparently as many different items as he chose [R. 112-113]. The 25 unit limit—either 25 different items, or 25 of the same item—began June 10 and ran to the end of the sale [R. 113].

without objection that it was not the best evidence [R. 110-116].³ And appellants also cross-examined Alexander on this testimony [R. 123-125].

Appellant was eminently qualified to give this testimony. He was employed by the War Assets Administration as the manager of automotive and construction equipment sales at Port Hueneme, and it was part of his duties to conduct sales of such surplus property. He was in charge of the particular sale here involved [R. 108].

Assuming that the court would have excluded this evidence had timely objection been made, it is settled that the objection is waived on failure to make it at the trial, and the evidence can be given its natural probative effect. *Diaz v. United States*, 223 U. S. 442, 450 (1912); *Rowland v. St. Louis and Santa Fe Railroad Co.*, 244 U. S. 106, 108 (1917); *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 155 (1941); *Becher v. United States*, 5 F. (2d) 45, 51 (C. C. A. 2, 1924), cert. den. 267 U. S. 602; *Burgess v. King*, 130 F. (2d) 761, 763 (C. C. A. 8, 1942). In the *Becher* case, copies made by a United States storekeeper of inspectors' records were admitted without objection. The court pointed out that they were only secondary evidence, the inspectors' records not having been produced, but found no error.

Appellant further contends (A. B. 11) that there was no evidence or instructions by which the jury would know that there was any rule, regulation, or directive requiring

³At the outset of Alexander's testimony there was an objection to a question relating to changes in orders concerning eligibility to purchase, on the grounds, among others, that it was not the best evidence [R. 110-111]. The Government withdrew the question [R. 111], and that particular objection to this line of questioning was not renewed.

the statements made by Taylor. The applicable regulations have been previously discussed. And the jury was instructed "that statements and representations in 'Veterans' Applications for Surplus Property' and 'Purchase-Requisition Forms' are matters within the jurisdiction of an agency of the United States, within the meaning of that statute" [R. 336]. These were questions of law, which were properly decided by the court.

Appellant also makes much of the point that dealers who bought at the sale could resell to anyone (A. B. 12). However, as previously pointed out, Taylor, the veteran in Count Four, was not a dealer [R. 185, 226] and hence had to and did certify that he was buying for his own use. The testimony as to what dealers could do is irrelevant.

(3) Causing Statements to Be Made.

Appellants also contend that there is no evidence appellants caused Taylor to make the false statements (A. B. 12-14). A review of all the evidence will indicate ample proof from which the jury could and did find appellants had caused the false statements to be made. This Court, of course, does not weigh the evidence or determine the credibility of witnesses, and the finding of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to, support it. *Glasser v. United States*, 315 U. S. 60, 80 (1942).

Taylor testified that appellant Todorow approached him in Los Angeles, and told him he could make \$20.00 if he would buy some trucks for him [R. 175-176]. He was told to buy six two-and-one-half ton 800-gallon refueler trucks [R. 178, 179, 183]. Appellants drove him from Los Angeles to Port Hueneme, along with another vet-

eran engaged in a similar transaction [R. 176-183]. On the way up appellant Potolski stated that he and Todorow had bought their limit of 25 trucks each, and were using other veterans' priorities [R. 177]. Appellants told Taylor and the other veteran they were to buy six trucks apiece [R. 183] and went into the certification shack with them [R. 183]. When questioned about filling out the application, Taylor testified as follows [R. 184]:

“Q. Directing your attention to the words under ‘Description of enterprise’—‘transporting oil,’ is that your handwriting? A. Yes; it is, sir.

Q. Did you have any conversation with either of the defendants prior to making out that word, writing those words ‘transporting oil’? A. Upon coming to that point in the application, intending not to buy the trucks for my personal business, I did not know what to put down under that question. I then referred to Mr. Todorow.

The Court: How do you mean you referred to him?

The Witness: Well, your Honor, he was present in the certification shack.

The Court: Did you say something to him?

The Witness: I walked over to him and I asked him.

The Court: What did you say?

The Witness: I asked him as to what business I ought [417] to put down.

The Court: And what did he say?

The Witness: He said that there was no question as to what business I was going in and that anything would be sufficient.”

Taylor was not in the oil transporting business, and had no intention of going into that business [R. 185]. Taylor then obtained the Purchase-Requisition Forms [Gov. Ex. 6, R. 379-380], on which the particular trucks were noted by number. Taylor never examined any of the trucks to pick out what he wanted [R. 187]. When, through some error, he was given a Purchase-Requisition Form for only one truck, it was appellant Todorow who straightened it out for him and got another requisition for five trucks [R. 188-189]. Taylor then got the contracts for the trucks, and turned them over there at Port Hueneme to Todorow [R. 192-193]. Taylor was paid his \$20.00, and was made to sign a receipt by Potolski [R. 194]. The legality of the transaction was discussed on the way back, and Potolski said, "We didn't want it to look like you were buying them for us" [R. 196].

Appellants confirm by their testimony the main outlines of this story. Todorow admitted talking to Taylor about oil trucks prior to the trip to Port Hueneme, and even conceded that he told Taylor he would buy trucks from him [R. 286]. Appellant Potolski also admitted he told the veterans that appellants wanted oil trucks, and that he told Taylor he would buy from Taylor [R. 251, 252-253]. Appellants admit the trip to Port Hueneme with Taylor [R. 227, 288], the payment of \$20.00 to Taylor [R. 228, 247]. And appellants admit they obtained from Taylor his contracts for the six trucks [R. 255, 312]. Appellants further stated that \$25.00 was the going price for buying trucks from dealers [R. 256, 294]. In addition, appellants were familiar with the procedure and forms,

having bought 25 trucks each themselves under certification as veterans.

Evidence of a similar transaction on the same trip between appellants and Lauridsen, another veteran, was admitted as bearing on appellants' intent [R. 158, 185-186, 192-193].

From this recital, it is apparent that substantial evidence was offered from which the jury could find appellants caused the statements to have been made.

Appellants also suggest that the rule in perjury cases requiring two witnesses to a transaction should apply (A. B. 14-16). However, there is no analogy here, for there is no dispute in the evidence as to the falsity of the statements, and that they were made. The only dispute is if appellants caused them to be made. On that, the testimony of Taylor, plus the corroborating circumstances outlined above, are sufficient to sustain the verdict. Even if Taylor be viewed as an accomplice, it is well-settled that in the Federal Courts a defendant can be convicted on the uncorroborated testimony of an accomplice. See, *e. g.*, *Caminetti v. United States*, 242 U. S. 470, 495 (1917); *Westenrider v. United States*, 134 F. (2d) 772, 774 (C. C. A. 9, 1943); *United States v. Wilson*, 154 F. (2d) 802, 805 (C. C. A. 2, 1946, judgment vacated and remanded for resentencing 328 U. S. 823); *Kempe v. United States*, 151 F. (2d) 680, 686 (C. C. A. 8, 1945); *Robertson v. United States*, 111 F. (2d) 1018 (C. C. A. 6, 1940).

II.

The Jury Was Properly Instructed.

Appellants attack the giving of two instructions (A. B. 18-22) and the failure to give three instructions requested by appellants (A. B. 22-24). The court's rulings on these instructions were proper.

(1) Proof of Falsity of All Representations.

Appellants object to the instruction of the Court [R. 338-339] to the effect that the Government need not prove that the statements charged in the indictment were false in all the particulars charged, but only that one or more of such representations was false. The charge as given by the Court correctly stated the law. When several false statements are pleaded in the conjunctive, it is not necessary for the Government to prove all of them.

This is so in the case of perjury. *Shallas v. United States*, 37 F. (2d) 692, 694 (C. C. A. 9, 1929); *United States v. Otto*, 54 F. (2d) 277, 279-280 (C. C. A. 2, 1931); *United States v. Mascuch*, 111 F. (2d) 602, 603 (C. C. A. 2, 1940), cert. den. 311 U. S. 650. In the *Shallas* case, where it was charged that defendant had testified falsely that he had seen an individual at a hotel in the morning and again twice in the afternoon, this Court said it was sufficient if the Government proved only that it was false as to the afternoon. And in *Warszower v. United States*, 312 U. S. 342, 345 (1941), the Court sustained a conviction for use of a passport secured through false statements where the Court below had charged the jury they could convict if any one of the statements charged in the indictment was found false.

Similarly, in mail fraud prosecutions, it is well settled in this circuit that all the Government need prove is that

one or more material misrepresentations charged in the indictment are false, and the balance of the representations alleged need not be proven. *Lewis v. United States*, 38 F. (2d) 406, 410 (C. C. A. 9, 1930); *Levine v. United States*, 79 F. (2d) 364, 369-370 (C. C. A. 9, 1935); *Ballard v. United States*, 138 F. (2d) 540, 545 (C. C. A. 1943), reversed on other grounds, 322 U. S. 78. In cases of conspiracy, it is not necessary to prove but one of the various overt acts alleged in support of the conspiracy. *De Lacey v. United States*, 249 Fed. 625, 628 (C. C. A. 9, 1918); *Fredericks v. United States*, 292 Fed. 856, 857 (C. C. A. 9, 1923).

The cases cited by defendant (A. B. 18), even if viewed in their strongest light, do not affect the charge here. Taking the *Cramer* case as an example (A. B. 18; 325 U. S. 1, 36, footnote 45), a footnote suggests that in treason, if several overt acts are submitted to the jury and a general verdict of guilty is found, and if any one of the overt acts submitted is not supported by evidence, the conviction must be reversed. Assuming that such is the law, there is sufficient evidence of the falsity of each of the statements alleged in Count Four of the indictment in this case.

The false statements alleged are [R. 6]:

"In said application and form, Byron N. Taylor stated and represented that he would immediately start an oil transporting business as an individual proprietorship under the trade name of 'Byron N. Taylor,' and that he was purchasing said vehicles for his own personal use or for the maintenance of said oil transporting business and not for the purpose of resale. Said statements and representations, as the defendants then and there well knew, were false and fraudulent in that Byron N. Taylor had no intention

of starting said oil transporting business or any other such business and was not purchasing said vehicles for his own personal use or for the maintenance of any business in which he had or intended to have an interest but, in truth and in fact, was purchasing said vehicles for the sole benefit and account of the defendants with funds advanced by them.”

Proof of falsity was established by Taylor’s testimony that he had no intention of going into the oil transporting business, and that he was an elevator operator [R. 185]. He was asked by appellants to buy the trucks for them [R. 176, 183] and he turned the contracts to buy the six trucks issued by War Assets over to appellants for \$20.00 [R. 193]. Appellants admitted they obtained the purchase papers [R. 255, 312], but did not go through with the deal and pay the money because of the call made on them by Government agents [R. 255].⁴

(2) Flirting With the Jury.

Counsel objects to the italicized portion of the following charge [R. 339]:

“You should distinguish carefully between what has been testified to by the witnesses and what has been stated by the attorneys. *Statements and arguments of counsel, and stage-play and acting and flirting with the jury by counsel are not evidence in the case.* Anything that counsel say or do will not constitute evidence in the case and has no bearing upon the evidence in the case.”

⁴Under the sales procedure, a veteran was allowed a period of 10 days after he received a contract from War Assets Administration in which to pay for the goods allotted him [R. 120]. Appellant Todorow testified that because of the mode of payment for articles—by bank check—there was no way of telling who was making the payment [R. 300].

Appellants contend this was prejudicial to defense counsel, and that the Court wrongly gave this portion of the charge without previously having shown it to counsel (A. B. 19-22, 48-49).

Appellant makes no contention that the charge is not an accurate statement of the law, and it is difficult to understand how a fair statement of law in a charge can be prejudicial. The charge does not single out defense counsel, but applies equally to all counsel. It is conceivable that it would hurt defense counsel if he, and he alone, had engaged in "stage-play and acting and flirting with the jury," but the Court would be derelict in its duty if it should condone such conduct by ignoring it. If, as defendant contends (A. B. 20-21), there was no such conduct on his part, his is not prejudiced thereby.

This instruction, a correct statement of the law, singling out neither counsel, is quite different from instructing the jury that the defendant lied on the stand (*Quercia v. United States*, 289 U. S. 466, 468; A. B. 48-49) or that they must find defendant guilty unless they found some one else committed the theft (*Bihn v. United States*, 328 U. S. 633, 637; A. B. 48). Such was the situation in the cases from which appellants quote (A. B. 48-49).

The excerpt from the record in which the Court described counsel's conduct [R. 347, A. B. 49] occurred out of the presence of the jury [R. 344], and hence could not prejudice appellants.

As to appellants' objection that the modified instruction was not previously submitted to counsel, Rule 30 of the Rules of Criminal Procedure is pertinent. Under that rule, the Court must inform counsel of its proposed action on requests for instructions prior to arguments. However, there is no requirement in the rule that the Court furnish counsel in advance with copies of charges that the

Court proposes to give as its own charges. In the present case, counsel was furnished with a copy of the Court's proposed charges, including a charge to disregard statements of counsel, but the charge was amplified thereafter by the Court to include "stage-play and acting and flirting with the jury." Since the Court already had done more than the rule obliged it to, there was no violation of the rule. And counsel knew before argument that there would be a charge that statements of counsel were not evidence, so that counsel could have commented upon it in his argument, had he wanted to do so. This is not a point of law which would cause counsel to make any basic change in his argument in any event. As the Court said in *Steinberg v. U. S.*, 162 F. (2d) 120, 125 (C. C. A. 5, 1947), cert. den. 322 U. S. 808, where the failure of the Court to indicate its rulings on requests to charge in advance of argument is an error of an inconsequential sort, a conviction will not be set aside. Such is certainly the case here.

(3) Defendants' Instruction 19 [R. 28].

Defendants' 19, which the court rightly refused to give, dealt with innocent intermediaries and proximate cause. The court gave lengthy instructions on "cause" as used in the indictment [R. 337-338]. And, as a matter of fact, although the court's charge does not use the words "proximate cause," it gives a detailed definition of them [R. 337]. Further, the court instructed the jury to acquit appellants "if you find that the defendants did not knowingly and wilfully cause any false statements to be made" [R. 340].

In connection with this instruction, counsel also raises the question of the testimony of accomplices (A. B. 23). The court cautioned the jury at length on accomplice tes-

timony [R. 334-335], and appellants make no attack upon this charge.

(4) Defendants' Instruction 16 [R. 27].

The court also refused to give Defendants' 16, an alibi instruction. The present case does not involve the usual alibi situation, where defendants' presence at the scene of the crime is essential. As the jury was here charged, because of Section 550 of Title 18, it was not necessary to show that each defendant committed each and every step necessary to completion of the offense [R. 340]. There was some evidence Potolski was not in the certification shack when Taylor made out the form, but there was evidence that he was [R. 185], and there was evidence he and Todorow were working together [R. 322]; and had driven Taylor to Port Hueneme together, discussing their joint purpose on the way. On that trip, Potolski stated that, because he and Todorow had exhausted their quota, they were using veterans' priorities [R. 177]. Potolski made the \$20 payment to Taylor after they left Port Hueneme [R. 228]. The mere fact Potolski may not have been in the shack at the moment one step in the transaction occurred did not give him an alibi in the usual sense of the word, so the alibi instruction was not called for. Counsel in argument could call attention to testimony as to his absence.

(5) Defendants' Instruction 5 [R. 22].

Defendants' 5 instructs the jury that conduct of parties subsequent to the offense was relevant. Since the evidence was admitted, the jury could rightly consider it, and counsel could argue concerning it. There was no need to single such testimony out in an instruction, and the instruction was rightly refused.

III.

The Indictment Is Sufficient.

Appellants attack the sufficiency of the Indictment for failure to allege a great variety of matters, most of which are evidentiary (A. B. 25). The Indictment in the case is clearly sufficient. It contains all the requisite statutory language, identifies the exact papers in which the false representations were made, specifies in exact language the false representations and tells in what respect they were false, identifies the veteran involved, and gives the date.

Considering the objections as they are raised (A. B. 25), the indictment does state that the property was the property of the United States [R. 5-6]. It states further that the matter of authorizing and approving the sale was a matter within the jurisdiction of the War Assets Administration, which satisfies the statutory requirement of the crime, and could be said to satisfy even appellants' requirement that the indictment charge that the sale was being "conducted" by War Assets Administration. The details set forth in the second paragraph of page 25 of appellants' brief, if relevant, all go to matters of proof.

In *Chevillard v. United States*, 155 F. (2d) 929, 932 (C. C. A. 9, 1946), this court sustained an indictment under Section 80 where a similar series of points was raised. This Court also held that the words "in a matter within the jurisdiction of a department or agency of the United States" need not even be used, as long as such facts did appear. And in *Bost v. United States*, 103 F. (2d) 717, 720 (C. C. A. 9, 1939) this Court held as "wholly lacking in merit" a contention that an indictment under Section 80 was bad for failure to allege that the gold which was reported had to be reported on the particular form of affi-

davit on which the indictment was based. This is similar to appellant's contention the indictment should charge that the forms here used were necessary.

Since the decision in *Hagner v. United States*, 285 U. S. 427, 431-434 (1932), federal courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations. In that case, in construing an indictment under the mail fraud statute, the Court said (285 U. S. 431):

"The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U. S. 286, 290; *Rosen v. United States*, 161 U. S. 29, 34."

These general principles have been embodied in the various suggested forms of indictments in the Appendix of the Rules of Criminal Procedure (cf. Form 6, Indictment for Interstate Transportation of Stolen Motor Vehicles). And Rule 7(c) states that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Based on these tests, the indictment in this case is clearly sufficient.

IV.

The Court Was Correct in Its Rulings on Evidence.

Appellants also object: (1) to the refusal of the court to permit them to ask a Government witness: "You know now that you did commit a felony at that time?" (A. B. 26-27); (2) to the admission over appellants' objection of evidence of the Lauridsen transaction to show intent (A. B. 27-35); and (3) to the cross-examination of appellant Todorow concerning the dealer's license number appearing on his application for priorities (A. B. 35-40).

(1) Exclusion of Felony Question.

The court properly refused to allow appellants to ask Taylor, a Government witness, "You know now that you did commit a felony at that time?" This question is argumentative, and calls for the conclusion of the witness. It relates to the signing by Taylor of the Veteran's Application for Surplus Property containing the false statements. Counsel had previously been permitted to ask the witness if he had read the certification on the Application before he signed it, and if he knew that he was signing a false document [R. 203]. Counsel was also permitted to ask Taylor if he had been prosecuted for such offense, and if he hoped not to be [R. 204]. A reading of these pages of the record in their entirety [R. 203-204] shows quite clearly this was not a case where "the Court chopped off defense counsel in his questioning of Taylor, the principal witness in the case in this transaction on the fundamental issue of guilt or innocence involved in it." (A. B. 26.) Taylor's knowledge of the quality of his acts, and of his hope of immunity, were explored, and the question stricken was a patently objectionable question in a series covering the same matter.

Appellants also contend that the court's statement, "You do not need to answer that. Put another question," in ruling on the Government's objection, "put defense counsel in a bad light before the jury" (A. B. 26). The mere statement of this objection in its own answer. Cf. *Simon v. United States*, 123 F. (2d) 80, 83 (C. C. A. 4, 1941), cert. den. 314 U. S. 694.

(2) Evidence of Other Acts.

Appellants object at length to the admission of evidence of the Lauridsen transaction, as bearing on appellants' intent. Lauridsen, a veteran employed as a parking attendant at appellants' hotel [R. 191], went with appellants and Taylor on their trip from Los Angeles to Port Hueneme and back for the same purpose as Taylor. He made out an application and was certified for six oil trucks, and turned his papers over to appellants, and was paid \$15 by them [R. 176-183, 185-186, 191, 193-195, 157-160, 230, 292]. 292].

The general rule is that evidence of other acts or crimes of a defendant are not admissible in evidence, because they are both too remote and too prejudicial. There are, however, important exceptions permitting evidence of such acts to show intent, purpose, design, or knowledge. *Williamson v. United States*, 207 U. S. 425, 450-451 (1908); *Jones v. United States*, 258 U. S. 40, 48 (1922); *Paine v. United States*, 7 F. (2d) 263, 264-265 (C. C. A. 9, 1925); *Heskett v. United States*, 58 F. (2d) 897, 900 (C. C. A. 9, 1932), cert. den. 287 U. S. 643; *United Cigar Whelan Stores Corp. v. United States*, 113 F. (2d) 340, 346-347 (C. C. A. 9th, 1940); *Tedesco v. United States*, 118 F. (2d) 737, 739-741 (C. C. A. 9, 1941); *Henderson v. United States*, 143 F. (2d) 681, 683 (C. C. A. 1944).

Mr. Justice Story stated the rationale of the rule in *Wood v. United States*, 41 U. S. (16 Pet.) 342, 360 (1842):

“The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.”

And this rule is of course applied in cases under Section 80 of Title 18. *Roberts v. United States*, 137 F. (2d) 412, 415 (C. C. A. 4, 1943), cert. den. 320 U. S. 768; *United States v. Uram*, 148 F. (2d) 187, 189 (C. C. A. 2, 1945).

There is also a well settled exception permitting the admission of such evidence to show plan, scheme or design. *Henderson v. United States*, 143 F. (2d) 681, 683 (C. C. A. 9, 1944); *Schwartz v. United States*, 160 F. (2d) 718, 721 (C. C. A. 9, 1947); *Tomlinson v. United States*, 93 F. (2d) 652, 654 (App. D. C. 1937), cert. den. 303 U. S. 646, 642.

In the *Henderson* case, this Court sustained the admission of evidence of illegal transfers of gasoline coupons,

in addition to those charged in the indictment, as showing the indicted transfers were part of an unlawful plan, scheme, or design.

Such evidence is also admissible where it is so commingled with the crime as to form one transaction, and proof of one involves proof of the other. *Johnston v. United States*, 22 F. (2d) 1, 5 (C. C. A. 9, 1927), cert. den. 276 U. S. 637; *Schwartz v. United States*, 160 F. (2d) 718, 721 (C. C. A. 9, 1947).

In admitting the Lauridsen evidence, the Court repeatedly cautioned the jury as to its limited purpose, stating that the jury could not consider it as evidence tending to prove any transaction in the indictment, but that if the jury should find that the transactions charged in the indictment had occurred, then they could consider the Lauridsen evidence on the question of the intent with which the acts charged in the indictment were done [R. 160, 166, 186, 192]. The Court was prepared to repeat the same instruction in its charge to the jury, but omitted it at the express request of appellants [R. 389-391].

(3) Todorow's Dealers License.

Appellants also object to the permitting of cross-examination of appellant Todorow concerning a dealer's license number on his Veteran's Application for Surplus Property (A. B. 35-40).

Todorow had testified on direct examination that he had been given certain forms to fill out by the certification of-

ficer at Port Hueneme, and that he had filled them out [R. 267], and further that the certification officers had not told or instructed him how to fill out the forms [R. 297]. On cross-examination, the Court permitted the Government to examine Todorow concerning the phrase "Dealer License 11-135" which was on the Todorow Veteran's Application for Surplus Property [Gov. Ex. 2, R. 371]. The certification officer had stated that he had asked appellants if they wanted the cars for resale, if they were *bona fide* auto dealers, and what their license numbers were, and had written the numbers they told him on the forms [R. 150-153]. It would thus appear that the matter of the forms was opened up by appellant on direct, and could be gone into on cross-examination.

Even if this Court should feel that the matter was not opened on direct, it was a proper subject of cross-examination. A defendant taking the stand is like any other witness, and can be examined for the purpose of impeaching his testimony. *Reagan v. U. S.*, 157 U. S. 301, 305 (1895); *Raffel v. U. S.*, 271 U. S. 494, 497 (1926).

Impeaching questions that go to conduct reflecting upon a defendant's integrity or veracity are proper. *Coulston v. U. S.*, 51 F. (2d) 178, 181-2 (C. C. A. 10, 1931]; *Banning v. U. S.*, 130 F. (2d) 330, 337 (C. C. A. 6, 1942), cert. den. 317 U. S. 695. Various types of impeaching questions, far less directly connected with the issues than those here, have been permitted by the courts. *Simon v. U. S.*, 123 F. (2d) 80, 85 (C. C. A. 4, 1941). cert. den. 314 U. S. 694 (if made false statement in visa

application and income tax return); *United States v. Rubenstein*, 151 F. (2d) 915, 919 (C. C. A. 2, 1945), cert. den. 326 U. S. 766 (if defendant ever disbarred or suspended) ; *United States v. Waldon*, 114 F. (2d) 982, 984 (C. C. A. 7, 1940), cert. den. 312 U. S. 681 (if defendant used alias); *Viereck v. U. S.*, 139 F. (2d) 847, 851-2 (Dist. of Col. 1944), cert. den. 321 U. S. 794 (if defendant claimed privilege against self-incrimination when subpoenaed as witness concerning same matters); *United States v. Frankel*, 65 F. (2d) 285, 288 (C. C. A. 2, 1933), cert. den. 290 U. S. 682 (if had failed in business, and had changed name of company because of finance company trouble); *United States v. Buckner*, 108 F. (2d) 921, 927 (C. C. A. 2, 1940), cert. den. 309 U. S. 669 (circumstances surrounding resignation from Bar). It is apparent that the Court has wide discretion in cross-examination, and such discretion was not abused in this case.

Further, appellant Todorow, when asked the disputed questions, disclaimed any knowledge of the license number or how it got on his application [R. 302-305]. In view of the answers of Todorow, it is difficult to see any prejudice, even if asking the question were improper. Rule 52(a) of the Rules of Criminal Procedure provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also 28 U. S. C. 391. Cf., *United States v. Frankel*, 65 F. (2d) 285, 288 (C. C. A. 2, 1933), cert. den. 290 U. S. 682. No prejudice has been shown here.

V.

The Trial Was Conducted Fairly.

Appellants pick out various incidents during the trial, and allege that they indicate a deprivation of a fair trial and the denial of the assistance of counsel. A reading of the entire record shows that appellants were given a fair trial, and that counsel had adequate opportunity to properly represent them.

(1) Remanding of Appellants to Custody and Speed of Trial.

Appellants contend that the remanding of appellants to custody on the first day of the trial, and the speed of the trial, deprived them of a fair trial and adequate representation by counsel (A. B. 41-43, 44-45, 50-52).

Appellants were indicted on November 20, 1946 [R. 6]. They were arrested in New York State and posted bond on November 21, 1946 [R. 88]. Appellant Todorow resisted removal, but removal was finally ordered, and arraignment and plea set for March 17, 1947, in Los Angeles [R. 88]. At the request of appellants, arraignment and plea were deferred to the date of trial in order to save appellants and their counsel a lengthy trip [R. 88-89]. Arraignment, plea, and trial, were, on March 13, 1947, set for April 22, 1947, and appellants promptly so notified [R. 89]. On April 21, 1947, present counsel for appellants asked for a continuance until the 24th on the grounds that he had just been retained as counsel and did not know the facts and that he was not sure appellants could be there in time because of bad flying weather. This request was denied [R. 48-53]. New York counsel for appellants had been previously informed that the Government would not consent to any continuance [R. 49]. On the arraignment, plea, and trial date, April 22, only one

appellant, Potolski, appeared, and an affidavit was presented as to Todorow's illness [R. 54-57]. Because the Government did not wish to try the two separately, the case was continued until April 24. On April 24, both appellants were present, and the trial began [R. 68]. On the first day of trial, the Court ordered appellants committed and their bonds exonerated [R. 98]. Appellant Potolski had not even left New York on the 22nd, the day set for trial [R. 83].

The Court had the right to commit appellants once trial had begun. *United States v. Rice*, 192 Fed. 720 (C. C., S. D. N. Y., 1911). In view of the obvious efforts of appellants to put off the trial, and the lateness of Potolski in appearing, the Court acted within its discretion.

Even if the commitment was improper, it does not affect the propriety of the trial. Counsel makes much of the inconvenience appellants' commitment caused him. Many a defendant who cannot raise bail is similarly tried.

And the speed of which appellants complain is not apparent from the record.⁵ The Court sat only the customary hours, and while it sat on Saturday to make up for the postponement from Tuesday to Thursday, there was no trial on the following Sunday or Monday.

Appellants had six months to prepare for trial. Even when they hired new counsel at the last minute, he was hired on a Saturday [R. 90], and the trial did not begin until the following Thursday. And, as pointed out above,

⁵Trial consumed the following time:

Thursday, April 24—10:00-11:56, 1:45-4:25 [R. 10-15].

Friday, April 25—10:00-12:00, 1:45-4:30 [R. 15-17].

Saturday, April 26—10:00-12:25, 1:55-3:30 [R. 17-18].

Tuesday, April 29—10:00-12:15, 1:30-4:00 [R. 19-20].

Wednesday, April 30—9:30-12:00, 1:30-5:30 [R. 30-31].

Thursday, May 1—9:30-10:30 [R. 32].

there was a two-day break in the middle of the trial, before the Government had finished its case, which gave further opportunity for consultation. It is true that appellant Potolski claimed to be suffering from a stomach ulcer [R. 136], but he was able to fly out from New York, participate in the trial fully and take the stand, and looked dapper in court [R. 138]. In view of all these facts, and the fact that arraignment and plea was especially deferred to convenience appellants, there is no substance to the claim that they were denied counsel, and the Court's treatment of them was improper.

Appellants also quote various excerpts from the arguments over the commission of defendants (A. B. 44-45). Counsel contended that appellants should be released again on bail, because conditions in the county jail were bad [R. 133]. The Court permitted appellants' counsel to make a showing [R. 135], and when counsel suggested this be done by affidavits of appellants, the Court said it preferred appellants' testimony, since appellants were present in Court [R. 136]. This is cited as evidence of prejudice (A. B. 45). A preference of the Court for the best evidence is strange proof of prejudice. A description of appellants' appearance, made in the course of this showing, is also cited by appellants as prejudicial (A. B. 45). All this occurred out of the presence of the jury [R. 16]. Since the rules do not permit photographs in Court (Rule 53 of Rules of Criminal Procedure) a description in the record was the only way to show how appellants did look.

(2) Examination of Curtis Alexander (A. B. 43-44).

Appellants object to the remarks of the Court on two occasions during cross-examination of Curtis Alexander. The first remarks [R. 123, A. B. 43) embody the refusal of the Court to permit the question (which does not ap-

pear in the excerpt quoted in Appellants' Brief): "Didn't I understand you to say that?" This obviously unanswerable question is so clearly improper it is difficult to see how a refusal of the Court to permit it is prejudice.

The second excerpt [R. 126, A. B. 44] dealt with a refusal by the Court to permit appellants' counsel to continue a question beginning, "You testified on direct examination . . ." This was the beginning of a statement of the evidence by counsel, which was also obviously improper, and which the Court rightly cut off.

(3) Location of Counsel (A. B. 45, 46).

Appellants quote as indicating prejudice an excerpt in which the Court sent counsel for appellants to their seats after Government counsel protested that it was disconcerting to have both counsel up by the witness [R. 180, A. B. 45]. Appellants quote only the first sentence of the Court's remarks. The complete statement of the Court is [R. 180]:

"The Court: Yes, Mr. Lavine and Mr. Baughn [counsel for appellants], you will both take your seats. And you, Mr. Harrington [counsel for Government], will please stand at the lectern."

Appellants also object to the Court making them stand at the lectern to question witnesses [R. 291, A. B. 46]. As this Court knows, this is a common requirement of many judges in the conduct of their Court, and lies in the discretion of the Court. As the excerpt quoted just above indicates, the requirement was imposed on Government counsel, as well as on appellants' counsel.

(4) Cross-Examination of Taylor (A. B. 45-46, 47-48).

Appellant states that the Court's remarks in connection with four rulings as to Taylor's testimony indicate prejudice. The first ruling, on the question, "You know now

that you did commit a felony at that time,” is discussed at length in Part IV, subsection (1) of this brief.

The second excerpt [R. 205, A. B. 46] deals with the Court’s ruling on an argumentative question calling for a conclusion of the witness. It will be noted from the excerpt that counsel twice asked the same improper question, and the Court had twice to repeat its ruling.

The third excerpt [R. 202, A. B. 47] omits the question concerning which the discussion was had. That question was vague, uncertain, and indefinite, and was again repeated by counsel twice in similar form.

The fourth excerpt [R. 203, A. B. 47-48] involves a question improper in form.

It is obvious from these assignments of error that appellants do not like the judge’s rulings, but cannot find legal fault with them as such, and hence charge that correct rulings on the law indicate prejudice. It should be noted in this connection that the Court instructed the jury that they were to draw no inference against either side from rulings or admonitions of the Court in connection with rulings on evidence [R. 342].

(5) Questioning of Witnesses by the Court (A. B. 46).

The Court did question witnesses on occasions, specified by appellants in their brief, but study of the record will show that it was in attempts to clarify issues. On the first such occasion cited by appellants, the Court instructed the jury that they should not draw any inference from questioning by the Court, but that they were sole judges of the facts [R. 143-144]. And the jury were so instructed again in the final charge [R. 341]. There is clearly no prejudice or denial of a fair trial shown here.

(6) The Sentence (A. B. 50).

Appellants object to the remanding of appellants to custody following conviction. This, of course, occurred after the trial was over and after appellants had been found guilty by the Court. It is a common matter to commit defendants on conviction to await sentence, and it was the policy of the particular Court which heard this case in all felony cases [R. 352]. Appellants hint that the Court was anxious to sentence appellants immediately (A. B. 50). The Court offered to sentence appellants immediately only after appellants requested an early sentence, but suggested that a probation report would permit him to act more intelligently, and that such would require about two weeks [R. 352].

(7) Appellants' Argument (A. B. 47).

Counsel objects to interruption of his argument to the jury by the Court because counsel started with an expression of personal opinion [R. 329; A. B. 47], and to the Court's interruption to prevent counsel's repeated use of the epithet "liar" [R. 329-330; A. B. 47].

Personal opinions of counsel are of course not proper, and the court in its discretion can control the argument to limit such expression. *Cf. United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 240-243, and the dissent of Mr. Justice Roberts at pp. 264-267. And the use of epithets falls in the same class.

In addition, counsel had been warned concerning both practices in advance of argument [R. 329, 330].

A consideration of all the examples culled by appellants from the record to indicate denial of a fair trial, shows the contrary to be the fact.

VI.

The Bill of Particulars Was Properly Denied.

On the day to which trial was continued, and on which trial was actually begun, appellants filed a motion for a bill of particulars, asking for the name of the person to whom the forms specified in the indictment were given, and the time, place, and persons present, and the exact language of the forms and of each act specified in the indictment [R. 10]. This motion was properly denied.

The information sought was obviously matters of evidence. Count Four of the indictment specified the date, the veteran, the particular form involved, the false representations contained therein, and the particulars in which they were false. These were ample to permit appellants to prepare their defense. In *Frederick v. United States*, 163 F. (2d) 536, 545-546 (C. C. A. 9, 1947), cert. den. 332 U. S. 775, this Court sustained the denial of a bill of particulars requesting similar information where the information involved contained far less specific details than the indictment in the present case.

Appellants allude to Rule 16, permitting discovery and inspection, but appellants never proceeded under such rule. Rule 16 would not have helped them if they had used it, because the forms involved were not either "obtained from or belonging to the defendant or obtained from others by seizure or by process," as the rule requires.

Further, the demand for the bill was not made until April 24, 1948, six months after indictment. It was made on the day to which trial had been continued at appellants'

request. Such delay in requesting a bill suggests that the information asked could not have been too vital to appellants' defense. Where there is such delay, a denial by the Court on that ground alone is not an abuse of discretion. *Barnard v. United States*, 16 F. (2d) 451, 453 (C. C. A. 9, 1926), cert. den. 274 U. S. 736.

Conclusion.

It is obvious from a consideration of the entire record that appellants were accorded a fair trial, and were adequately represented by counsel. The various actions of the Court and the admonitions given were amply called for by conduct of appellants and their counsel, and were not improper. There were no errors of law in the rulings of the Court and the evidence is sufficient to support the verdict. The conviction should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney;

PAUL FITTING,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 11629.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

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Appellee.

APPELLANTS' REPLY BRIEF.

MORRIS LAVINE,

620 Bartlett Building, Los Angeles 14

Attorney for Defendants and Appellants.

FILED

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PAUL P. O'BRIEN

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APPELLANTS' REPLY BRIEF.

To the Honorable Court of Appeals for the Ninth Circuit:

Since our opening brief this Court has decided *Samuel, et al. v. United States of America*, No. 11,402 (August 24, 1948). We believe this case is decisive of several of the issues which we have presented herein.

In their brief the Government points out various War Assets Administration Regulations which they claim place the matter within the jurisdiction of the War Assets Administration. They quote the Surplus Property Act of 1944 and War Assets Administration Regulation No. 2 and various other sections, which they claim give jurisdiction to the War Assets Administration of the matters therein comprehended.

The difficulty, however, is that the jury was at no time given such information, either by way of evidentiary matters by the regulations being placed in evidence, or even by instructions to the jury.

Thus, what this Court said in *Samuel, et al. v. U. S.* as to the duty of the Court to instruct the jury on all essential questions of law involved, whether or not it is requested to do so, is peculiarly applicable here.

“In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. Kreiner v. United States, Cir. 2, 11 Fed. 2d 722; Kinard v. United States, C. A. D. C., 96 Fed. 2d 522; Morris v. United States, Cir. 9, 156 Fed. 2d 525; United States v. Levy, Cir. 3, 153 Fed. 2d 995; Corson v. United States, Cir. 9, 147 Fed. 2d 437; Miller v. United States, Cir. 10, 120 Fed. 2d 968; Screws v. United States, 325 U. S. 91, 107; United States v. Noble, 3 Cir., 155 Fed. 2d 315; United States v. Pincourt, Cir. 3, 159 Fed. 2d 917; see 169 A. L. R. 305-355 on the subject generally. We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.

“The applicable O. P. A. law is set out in the margin, and it shows that the formula for ascertaining the maximum wholesale whiskey price as given by the court had no relation to it.” (*Samuel, et al. v. United States, supra.*)

In the present case the Court at no time gave the jury an instruction as to the applicable statutes or regulations

covering the War Assets Administration. The Court gave this charge to the jury:

“Statements and representations as to intended use of surplus property by an applicant, which may be contained in ‘Veterans’ Applications for Surplus Property’ and ‘Purchase-Requisition Forms,’ are ‘statements and representations’ within the meaning of the statute which the defendants are charged with violating.

“You are further instructed as a matter of law that the War Assets Administration is an ‘agency of the United States,’ and that statements and representations in ‘Veterans’ Applications for Surplus Property’ and ‘Purchase-Requisition Forms’ are matters within the jurisdiction of an agency of the United States, within the meaning of that statute.”

This was objected to as invading the province of the jury, but at no place did the Court give the jury an instruction as to the applicable statutes or regulations involved. This was the duty of the Court to do. (*Samuel, et al. v. United States, supra.*)

The Court in this case not only did not give the law or the regulations, but what it did give was erroneous. This, therefore, is reversible error. (*Samuel, et al. v. United States, supra.*)

In our specification of errors in the opening brief we did not separately list under a heading the point that:

The Court failed to instruct the jury on the application laws and regulations of the War Assets Administration.

We argued it, however, under Point A, page 6, and on page 11 of our opening brief, and we request that it be designated as a separate specification, the authorities being above cited.

The regulation certainly did not apply on July 11, 1946, when veterans' preferences ceased, and it was simply the desire of the Government to sell its surplus property without regard to any preferences.

The second point that is decisive of this case has also been decided in *Samuel, et al. v. United States of America*, and that is that where the verdict is a general one, as in this case, and three or more alleged false statements are made and the jury instructed that their verdict might be given of guilty with respect to any one of the statements, it is impossible to say upon which, if any, of the statements the jurors agreed and it may be that one juror agreed on one and another juror on another and the third on another matter. Under the instructions given by the Court, which counsel objected to very strenuously, such an incorrect result necessarily followed.

In the case of *Samuel, et al. v. United States of America*, page 16 of the Court's opinion, this Court said:

"The case of *Stromberg v. California*, 283 U. S. 359, raises much the same point on principle that we have under consideration, and therein at p. 367, the court said: 'The verdict against the appellant

was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. (In our case the emphasis upon the same idea was a mandatory instruction to the jury by the judge presiding.) It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.' The case of *Williams v. North Carolina*, 317 U. S. 287, presents a situation close on principle to our case. At pp. 291-292, the court says: '* * * the verdict against petitioners was a general one. Hence, even though the doctrine of *Bell v. Bell* * * * (181 U. S. 175), were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz., the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the de-

fendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows that here as in *Stromberg v. California*, 283 U. S. 359, 368, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. (Invalidity for any other reason would be as effective.) No reason has been suggested why the rule of the *Stromberg* case is inapplicable here. Nor has any reason been advanced why the rule of the *Stromberg* case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.' The Supreme Court said by way of note to *Haupt v. United States*, 330 U. S. 631, at p. 641: 'When speaking of a general verdict of guilty in *Cramer v. United States*, 325 U. S. 1, 36 n. 45, we said "Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient," of course we did not hold that one overt act properly proved and submitted would not sustain a conviction if the proof of the other overt act was insufficient. One such act may prove treason, and on review the conviction would be sustained, provided the record makes clear that the jury convicted on that overt act. *But where several acts are pleaded in a single count and submitted to the jury, under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any*

wrongly submitted act was not the one convicted upon. If acts were pleaded in separate counts, or a special verdict were required as to each overt act of a single count, the conviction would be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved. *Cf. Stromberg v. California*, 283 U. S. 359, 368; *Williams v. North Carolina*, 317 U. S. 287, 292, and *Cramer v. United States*, *supra*.' (Emphasis added.)

"Summarizing our conclusion is: The judgment must be and is reversed because it rests upon a general verdict which may have been found upon the jury's conclusion that a conspiracy existed to violate any one, any two, or all of three United States laws, set up in one count, one of which was erroneously defined to the jury, and such erroneously defined law was so closely connected with both of the other laws in the alleged conspiracy as to affect the decision upon them to the reversible prejudice of all defendant-appellants."

Several other points are discussed in the Government's Brief but none of them sufficiently answer our opening brief to require further discussion here or else they miss the points presented by us.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Defendants and Appellants.

No. 11629

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

MORRIS LAVINE,
620 Bartlett Building, Los Angeles 14,
Attorney for Appellants.

FILED

MAR 7 - 1949

PAUL P. O'BRIEN, *~*
CLERK

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No. 11629
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Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

*To the Honorable Samuel M. Driver, Clifton Mathews
and Albert Lee Stephens, Judges of the United States
Court of Appeals for the Ninth Circuit:*

Come now the appellants and respectfully petition for rehearing upon the following grounds, to wit:

- (1) The court erred in matters of fact in its opinion;
- (2) The court erred in matters of law in its opinion.

I.

The Court Erred in Matters of Fact in Its Opinion.

In its opinion, this Honorable Court stated that the defendants were charged in Count Four with wilfully causing Byron N. Taylor to make false and fraudulent statements in a matter within the War Assets Administration, to wit, "In a Veteran's Application for Surplus

Property and a Purchase Requisition form filled out by Taylor.”

The opinion nowhere refers to the fact that the exhibits show that the applications were not made out on a form of the War Assets Administration, but on a form of the Smaller War Plants Corporation [R. 376], and there is no testimony that this form was a form that was a form of the War Assets Administration or that was within the jurisdiction of the War Assets Administration.

The form reads as follows [R. 376]:

(Photostat)

CONFIDENTIAL - For Use of Federal Agencies Only.		Form Approved Budget Bureau No. 13-72162 DO NOT FILL IN THIS SPACE	
Form SWS-66 (4-7-65) NATIONAL WAR PLANS COMMISSION VETERAN'S APPLICATION FOR SURPLUS PROPERTY (Under WPA Reg. 7)		Form Approved Budget Bureau No. 13-72162 DO NOT FILL IN THIS SPACE 733834004 Date JUL 25 1966	
1. Applicant BYRON N TAYLOR Street Name Initials		Telephone No. C.M. 65891	
2. Mailing address 2017-1st ST Street, Rm. or P.O. Box CITY AND STATE SANTA ANITA CALIF 94004		3. If other application has been filed on this form, WPC-66, indicate place and date of filing HAWAII	
4. Trade name of enterprise DANIEL		5. Address of enterprise DANIEL	
6. Street, Rm., or P.O. Box No. DANIEL		City and State CITY AND STATE DANIEL	
7. (a) Type of enterprise (Check one) Business <input checked="" type="checkbox"/> Partnership <input type="checkbox"/> Individual Prop. Intership <input type="checkbox"/> (b) Legal form of enterprise (Check one) Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Individual Prop. Intership <input checked="" type="checkbox"/>		(c) Description of enterprise TRANSPORTING OIL	
8. Is the enterprise already established <u>NO</u> If "Yes", are you now operating it? <u>Yes</u> or <u>No</u> How and when do you plan to start your operations if you are starting a new enterprise or buying into an exist- ing enterprise? <u>SAVING AS POSSIBLE</u>			
9. Size of enterprise. Specify estimated number of auto assets <u>Percent</u> Subsidiary in 2 months			
10. What enterprises, including <u>any</u> others have you in which you believe receive the <u>benefits</u> of this enterprise? <u>ONE BROTHER TRAINING IN HIGH SCHOOL AND SUFFICIENT EXPERIENCE IN SERVICE</u>			
Quantity (a)	Unit (b)	Description (List items in order of preference) (c)	To transportation desired? (For use of auto assets) (d)
6		Vehicle and spare parts CERTIFIED FOR VETERAN'S PREFERENCE H. L. KRUEGER, Chief, Veterans Branch	
11. Will you desire the extension of credit by WPC to the purchase of any of the items listed above? <u>Yes</u> or <u>No</u> If "Yes", please furnish the additional information requested in Items 12 through 17 following. 12. How many			

Case No. 18132
Date 7/25/66
One 6 is existing
Class 1
1:10 Trk. of Calif.
at 1:10 Trk. of Calif.
at 1:10 Trk. of Calif.
at 1:10 Trk. of Calif.

The Smaller War Plants Corporation was dissolved by an Act of Congress, December 27, 1945.

10 F. R. 15365.

No explanation is made as to the jurisdiction or power of the War Assets Administration, nor is there any showing that the alleged statements contained in the application were on an application of the War Assets Administration.

The document must, of necessity, speak for itself as a document of the Smaller War Plants Corporation and a form for Veterans' Application for Surplus Property of the Smaller War Plants Corporation, not an application of the War Assets Administration. We fail to see, therefore, how such a document or statement appearing in such a document is "a matter within the jurisdiction of the War Assets Administration." Very evidently, the court, in its decision, overlooked this important document, which is the basis of the entire prosecution for there is nowhere any mention of it in the entire opinion of the court.

See *Defense Supplies Corporation v. Lawrence Warehouse, et al.*, for the effect of dissolution of the Defense Supplies Corporation, 164 F. 2d 773.

The Court, further in its opinion, erred in the factual statement that "Taylor had no intention of going into the oil transport business." Whether Taylor did or did not intend to go into the oil transporting business rested on his own contradictory statements in the application which he made and the statement which he made in the court room contradicting what he said under penalty of making a false statement to the government in his writing on the Smaller War Plants Corporation form. The court incor-

rectly assumed that he was telling the truth in the court and not when he made his statement when he was making it on the form in question.

There is no more reason to give full credit to his statement in court than there was to give full credit to his other statement, which certified as follows, in question 18:

“I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief,” etc.

and further,

“that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed \$25,000 if an agricultural enterprise, or \$50,000 if a business enterprise,” etc. [R. 377.]

The evidence indisputably shows that Taylor, if not directly, was indirectly to be interested in the enterprise and that no person or persons other than veterans have, or will have, any proprietary interest in the enterprise.

The purpose of the statute and regulation, so far as the War Assets Administration was concerned, was not to deny veterans—both appellants being veterans with honorable discharges and excellent records—of the right to help other veterans in this, to the extent of paying him but of giving him an opportunity to make money in a “small business enterprise.” The appellants herein could

very well have, on July 11, 1946, bought all the government automobiles they wanted from "licensed automobile dealers who were not veterans but who could come to the war assets administration and buy on a first come, first serve basis without priority at all." How, then, was any statement made by a veteran to get automobiles for resale to other veterans, or to be associated with other veterans who were financing them, we respectfully submit, stretching the statute and the applicable regulation beyond their clear intent. It was for this reason that we contended from the start that the indictment did not state a public offense and, furthermore, that we contended that the evidence was entirely insufficient to justify the verdict.

On July 11, 1946, it was uncontradicted in the record that the sales were open to veterans and non-veterans on a first come, first serve basis. There was no restrictions except as to numbers of items and there was no restriction against a veteran buying his quota and turning it over to some other veteran who may have received his quota, or being in partnership with the veteran who may have already received his quota.

There is nothing in any of the testimony that shows that there was any restriction that forbade Todorow or Potolski from buying any trucks that Taylor might have acquired. Mr. Alexander testified that each purchaser could buy 25 units at the time [R. 121] but there was nothing to stop them from reselling these tank refueling trucks for a profit. The testimony was as follows:

"Q. By Mr. Lavine: Mr. Alexander, commencing July 2nd, the sales of surplus were then open to everybody, were they not? A. No; it was not,

Q. Was it open to non-veterans as well as veterans? A. Yes; it was.

Q. And the dealers could come in and buy, could they not, on July 2nd? A. Yes; they could.

Q. And there was no prohibition against the dealers reselling to anyone else, was there? A. No; there was not.

Q. So that, under your regulations, if a dealer bought 25 two and one-half-ton trucks there was nothing to stop that dealer from reselling to Mr. Todorow or Mr. Potolski as of June 2, 1946, isn't that correct?

The Court: You mean commencing July 2nd?

Mr. Lavine: Yes; commencing July 2nd, 1946.

The Court: On transactions had commencing July 2nd, 1946?

Mr. Lavine: Yes.

The Court: Your answer? A. That is correct.

Q. By Mr. Lavine: And could buy on July 11, 1946 from dealers—dealers who were non-veterans could buy up to 25 units of tank refueler trucks, could they not, after July 2, 1946? A. That is correct.

Q. And they could resell those tank refueler trucks to anyone for a profit, could they not? A. That is correct.

Q. In other words, they could resell six or resell up to 25 that they had bought to Mr. Potolski and Mr. Todorow, isn't that correct? A. That is correct.

Q. On July 11, 1946? A. That is correct." [R. 124.]

“Q. By Mr. Lavine: But they could rebuy from some other dealer, isn’t that correct; after July 2, 1946 anybody could buy from a dealer? A. That is correct.

Q. And although he was limited to getting 25 from the War Assets Administration, he could buy a hundred if he found three or four dealers who had the hundred, isn’t that correct? A. That is correct.

Q. Mr. Alexander, there were a number of veterans who came up to Port Hueneme, isn’t that correct? A. Many thousand.

Q. Many thousands. And they were buying all kinds of supplies that you had at Port Hueneme, isn’t that correct? A. That is correct.” [R. 125.]

It is thus evident that as of July 11, 1946, when the sales were open to veterans and non-veterans, that there could be no possible offense in veterans selling to veterans if even non-veterans could sell to veterans.

The court, therefore, incorrectly assumes the truth of at least one of two elements. It is, of course, undisputed that Taylor made the representations but that these representations were false is certainly not established by the evidence in this case.

The opinion states that “It may fairly be assumed that they (the defendants) were familiar with the procedure followed at the sale, the application forms used and the requirements as to veterans, as they had previously purchased their full quotas as veterans.” This assumption is not established by any substantial evidence as the form allegedly used by Taylor was a confidential form not released by the Governmental agency and, as a matter of fact, not shown to be a form of the War Assets Administration.

There is nothing in the record to show that a purchaser of six refueling trucks on July 11th, 1946 would be required to follow a procedure or use a form which was being used at some prior date or in some prior proceedings.

In view of the language of the application, as well as the language of the statutes, it cannot be assumed without testimony that "they knew that he was not a dealer and it is only claimed as priority as a veteran," nor is there any substantial proof that they induced him to make the application for the purchase of the trucks for their benefit and not for his own use, or that he was obliged to make the alleged representations.

The court states that there is no sound reason for invoking the perjury rule with respect to the testimony of Taylor for the reason that "we are not called upon to sustain the finding that statements were false beyond the rule or against an oath." However, the testimony in this case showed that Taylor was a neurotic war veteran [R. 200, 201]. "It was a release for a nervous condition." [R. 200.] He got a medical discharge. His fellow partner Lauridsen was in a mental hospital at the Sawtelle Veterans Hospital [R. 201]. Taylor had only been in the service nine months when he got his discharge on account of his nervous condition [R. 200]. He told the court he was a liar. He told the court he had lied in his application to the War Assets Administration. He told the court in the present case that he lied before and that now he was telling the truth. But, what substantially was there to establish that he was telling any more the truth now than he was when he falsified before the War Assets Administration? In any event he was an admitted perjurer. He sought, however, to blame somebody else for his falsification.

Under those circumstances, the rule in perjury should apply because it was his oath against the oath of each of the appellants that his statements were false and that they had caused him to make the statements that were in question. Can the statements of such a witness be considered substantial?

As said in *Sykes v. United States*, 204 Fed. 909, at page 912:

“And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke v. State*, 68 Neb. 154, 104 N. W. 154, 158.”

The case is very similar to *Dahly v. United States*, 54 F. 2d 37, 44. There, as here, the mental condition of the witness “was shown by the evidence to be open to serious question.” Taylor’s testimony was denied by the appellants and the only other witness to the conversation was an insane person. Thus it is said in *Dahly v. United States*:

“Without trenching upon the general rule that appellate courts will not usually weigh the evidence, yet on account of the foregoing considerations, and in view of the exceptional facts in the case, we are of the opinion that the testimony of Smith relative to the particular matters mentioned cannot be held to be substantial in any true sense of that word. 17 C. J.

§§ 3594-3596; Sykes v. United States, 204 F. 909 (C. C. A. 8); United States v. Murphy (D. C.), 253 F. 404; Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Green v. State, 6 Okl. Cr. 585, 120 P. 667; Stanford v. State, 16 Okl. Cr. 107, 180 P. 712; see, also, Mickle v. United States, 157 F. 229 (C. C. A. 8); State v. Moe, 68 Mont. 552, 219 P. 830; State v. Wilson, 76 Mont. 384, 247 P. 158; Cooper v. State, 130 Miss. 288, 94 So. 161."

Therefore, there is every reason for the "two witness rule" to apply in this case and, in any event, where the testimony is unsubstantial it should not form the basis of sustaining a conviction which will wreck two other veterans in their future whole lives sentencing them to the penitentiary for a period of two years, fining them \$3000.00 each, and taking away all their military credits—on such unsubstantial testimony.

Counsel for appellant, also, did not make clear his point that the instruction did not fully state the law and that one refused instruction should have been given in the light of the situation that is shown by the character of Taylor's evidence. Defendant's Instruction 19 specifically presented to the jury the question as to whether the acts done were done by Taylor on his own volition or were done as the result of having been caused to be done by the appellants. It was a very important question of fact which the court omitted to give to the jury and thus left the jury without one of its essential questions, namely, whether Taylor was falsely testifying as to "whether he did the thing on his own volition or did it on the suggestion or causation of appellants."

Another error in the instructions was whether there was any applicable regulation, rule, or order which applied

to the authority of the War Assets Administration. A crime could only be committed if there were applicable rules and regulations issued by the War Assets Administrator pursuant to statutory authority, which made or required a person seeking war surplus to make statements as alleged in the indictment; and, it was therefore just as impelling that the court and jury know both the rules and regulations governing the sales as it was to know exactly what the charge was against the appellants. Without this vital information in either the evidence or the bill of particulars, or otherwise, the jury was without a rudder to guide it as was, in fact, the court also.

The court also misconceives our objection to the instruction given by the court "that it was not necessary for the government to prove that Taylor statements were false in all particulars alleged in the indictment or that appellants caused every statement to be made," it being sufficient if there was the required degree of proof that the statements were false in any one or more particulars alleged and that appellants caused one or more false statements to be made.

The opinion incorrectly states that there was substantial evidence in the record that the statements made by Taylor were false. This is absolutely incorrect. Taylor gave his name and his address—those were not false. He gave his occupation and much other data in the applications that were not false. In fact, all of the statements that he gave could be said to be true except one disputed statement in which he claimed that he intended to go into the oil transporting business. Whether this was true or false rests on his last statement that it was false; but, in the printed form which he used, were inconsistent statements—some of which could be true or some of which

might not be true. They were not on any War Assets Administration form, and it would appear that this printed form contained the statement that the purchases were not to be for resale. However, the evidence is uncontradicted that the War Assets Administration was selling for the purpose of re-sale; that it had sold to the defendants themselves for the purpose of resale, and the sales were open to dealers on a first come first serve basis, with no priority, at the time of this purchase. Hence, the premises on which this court made its statement is not supported by the evidence.

The court further says that "The instruction correctly states the law," citing cases which ante-date the decisions of the Supreme Court of the United States in the cases of *Haupt v. United States*, 330 U. S. 661, and *Cramer v. United States*, 325 U. S. 1. In each of those cases the Supreme Court of the United States, in effect, held that there had to be unanimity by the jury on the overt act. This instruction deprived the jury of that unanimity. If there is more than one alleged false statement, six jurors might believe one and six others might believe the other, but never agree on the particular statement allegedly false. Hence the instruction is faulty.

We respectfully submit that it was not contended by the Government, in the case, that all of the statements that Taylor made were false. It was conceded in the oral argument that some of the statements allegedly false on certain applications were in fact not false and the court, in giving this instruction to the jury, was apparently mindful of that situation. Therefore, the procedure should have been for the Government to have withdrawn all statements or matters which it was conceded

were indisputably true, or on which there was no substantial evidence, and submitted to the jury only the particular statement allegedly false. The case had to rest, like perjury cases, on all of the statements being false or none of them being false. However, they did not do so and, for that reason, we respectfully submit that the instruction was erroneous and that this court erred in holding that it was correct and this court should grant a rehearing thereon.

The opinion also erroneously held that the trial court was correct in sustaining an objection to the question as to whether Taylor knew that "he would commit a felony at that time." Knowledge by Taylor that he committed a felony was vital to determine whether he was in fact an accomplice so that accomplice instructions might appropriately be not only given but weighed by the jury in the light of their finding that he was in fact an accomplice.

It was not merely for the purpose of bringing out that Taylor had not been prosecuted for the offense and hoped not to be prosecuted that the question was in fact asked. Those questions would not aid the jury in determining whether he had in fact committed a felony along with the appellants, whom he accused, and therefore that his testimony should be given less weight than the testimony of a credible witness. (*People v. Dail*, 22 Cal. 2d 642.)

The admission of Lauridsen's transaction, a man who could not be produced because the evidence showed he was in a psychopathic ward, certainly could not aid in establishing intent on the part of Taylor.

It was therefore error to admit the Lauridsen transaction in support of anything. Intent to make one false statement cannot be aided by the alleged making by somebody else of another alleged false statement.

The request to give an instruction regarding the effect of testimony regarding the conduct of the appellants subsequent to July 11th was not offered for the purpose of having court comment on the evidence but for the purpose of having the jury consider that testimony as to the effect that it would have on the lack of guilty intent on the part of the accused to commit any crime, or to commit any act charged in the indictment.

This court, in its opinion, also unjustly, we feel, and critically discusses the denial of appellants' motion for a bill of particulars. From the reading of the opinion, it would appear that the request for a Bill of Particulars "came at a very late hour," but aside from the matter of whether it was timely, etc., gives a wrong impression of what really happened.

The defendant Todorow was arraigned on April 22, 1947 [R. 9]. On that very day a Motion to Dismiss was made and a Motion for Bill of Particulars was filed and argued on April 24, 1947, two days later [R. 10-11, 72].

The rules provide that a Bill of Particulars may be presented at any time within ten days after arraignment (Rule 7f). Thus, within two days after arraignment of Todorow, and on the same day of the arraignment of Potolski, a request for Bill of Particulars was presented and denied. Surely, the rules would not require, nor was it possible to have presented a request for Bill of Particulars prior to the time of the arraignment of the defendants, and we respectfully submit that the request did not

come "at a very late hour," but in the case of Potolski probably as fast as it could have been presented, as it was presented within a few minutes after arraignment, and in the case of Todorow, within two days after arraignment. We submit that the implied criticism as to its coming at a very late hour would infer that counsel had waited two months after arraignment, when as a matter of fact, he had just come into the case the day before, and asked for bill of particulars the next day.

The request for Bill of Particulars certainly did not contain a request for evidentiary matters of a character to which petitioners were not entitled. The rules of Criminal Procedure themselves provide for the Government to furnish the documentary evidence requested in the Bill of Particulars. Rule 16 of the Rules of Criminal Procedure provide:

"Rule 16. Discovery and Inspection.

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect anod copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

New Federal Rules of Criminal Procedure.

This is practically no more than was requested under a Motion for a Bill of Particulars. The request was merely for information contained in the physical documents in the possession of the Government, to which Rule 16 specifically entitle the defendants, and a denial of the information therein requested was a denial of information contained in physical evidence in the possession of the government, which sets forth exact facts necessary for the defense of the case.

We respectfully submit, therefore, that it was error to deny these defendants the Bill of Particulars requested. The Bill also merely asked for the name of a person or persons to whom the forms were given in order that the defendants might make further inquiry and learn facts necessary to complete their defense. For which reasons appellants pray for rehearing and reversal of the judgment.

These appellants are fine young men with enviable war records; they were conducting legitimate business. They sought to aid other veterans rather than to buy from non-veteran dealers who would have made the profit or the money. Had they dealt with such non-veterans, there would have been no case here. Their innocence was demonstrated by the fact that they immediately cancelled any papers involved in their dealings with Taylor.

That they should now face two years in the penitentiary and \$3,000 fine each and the loss of all their soldiers' rights* for all time to come upon the testimony of an

*A veteran convicted of a felony loses all his veteran's rights, under various Veteran Acts.

admitted perjurer suffering from a nervous condition, we submit, is not warranted by the evidence in this case.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

Certificate of Counsel.

I hereby certify that the above petition for rehearing is taken in good faith and not for the purpose of delay and that in my opinion it is meritorious.

MORRIS LAVINE,

Attorney for Appellants.

No. 11630

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN 11 1947

PAUL T. O'BRIEN,

CLERK

No. 11630

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. SAMUELS,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MR. THEODORE M. MONELL,

1085-7 Mills Building,
San Francisco, California.

Attorney for Plaintiff and Appellant.

MR. J. J. DOYLE,

519 California Street,
San Francisco, California,

Attorney for Defendant and Appellee.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 354446

(District Court No. 26171G)

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC.,

a non-profit organization,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Comes now the plaintiff above named, and, complaining of defendant above named, alleges the following:

I.

That at all times herein mentioned defendant above named was and now is a non-profit organization incorporated under the laws of the State of New York and authorized to do and doing business in the State of California and in the City and County of San Francisco in said State.

II.

That at all times herein mentioned plaintiff above named was and now is the owner of that certain building generally known, numbered and designated as 437-439 Market Street in San Francisco.

III.

That on or about September 15, 1943, plaintiff above named by written lease leased to defendant above named all of that certain store, together with the basement thereunder, generally known as 439 Market Street, together with the entire second and third floors of said building, the entrance thereto being generally known as 437 Market Street in San Francisco, being the premises hereinbefore mentioned.

That by the terms and provisions of said lease it was therein provided that the term thereof should commence on the 15th day of September, 1943, and extend for a period of six (6) months from and after the cessation of hostilities in the present war with Japan.

IV.

That by the words "cessation of hostilities in the present war with Japan," plaintiff and defendant intended to refer to the cessation of open and hostile warfare as accomplished by the surrender of Japan on August 14, 1945, and as distinguished from a Presidential or Congressional declaration of the end of the war, which event has not yet occurred and may not occur for some years in the future.

V.

That a dispute has arisen between the parties hereto as to the construction of said lease, particularly with reference to the termination date thereof, it being the contention of plaintiff herein that said lease terminated six (6) months from and after

August 14, 1945, to wit, on February 14, 1946, by virtue of the surrender of Japan upon said August 14, 1945, and the cessation of hostilities at the time of said signing.

That it is the contention of defendant herein that "the cessation of hostilities" refers to the time when the President or Congress shall declare said war to have terminated.

VI.

That it is provided in and by the terms and provisions of said lease that in case suit shall be brought for the recovery of any rent due or because of the breach of any other covenant contained in said lease on the part of lessee to be kept or performed, the lessee will pay to the lessor a reasonable fee which shall be fixed by the judge of the court as part of the costs of such suit. That a reasonable fee to be allowed herein is the sum of three hundred (\$300.00) dollars.

Wherefore, plaintiff prays for the judgement of this court declaring the rights of the parties hereto under said lease as aforesaid and specifically declaring that hostilities in the present war with Japan ceased on August 14, 1945, and that said lease by its terms ended and terminated on February 14, 1946, and for attorney's fees herein in the sum of three hundred (\$300.00) dollars, and for costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

THEODORE M. MONELL,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

B. Samuels, being first duly sworn, deposes and says:

That she is the plaintiff named in the foregoing complaint; that she has read the said complaint and knows the contents thereof, and that the same is true of her own knowledge excepting as to the matters therein stated on information or belief, and as to such matters she believes it to be true.

B. SAMUELS.

Subscribed and sworn to before me this 13th day of June, 1946.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 2, 1946. C. W. Calbreath, Clerk.

In the United States District Court for the
Northern District of California
Southern Division

No. 26171G

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Defendant.

ANSWER TO COMPLAINT FOR
DECLARATORY RELIEF

Comes now United Seamen's Service, Inc., a non-profit organization, and answering the complaint of plaintiff, admits, denies and alleges:

I.

Answering Paragraph IV of plaintiff's complaint, defendant denies that prior to or upon the occasion of the execution of the alleged lease that defendant used the phrase, "Cessation of hostilities in the present war with Japan," and/or that defendant directly or indirectly agreed, assumed or intended, either by inference, by positiveness, suggestion or words, or otherwise, that the termination date of said lease dependent and/or effective upon the contingency construction now sought by plaintiff.

II.

Answering Paragraph V, plaintiff's complaint, defendant denies that prior to or upon the occasion of the execution of the alleged lease that defendant used the phrase, "Cessation of hostilities at the time of said signing," and/or that defendant, directly or indirectly, agreed, assumed or intended, either by inference, positiveness, suggestion, words or otherwise that the termination date of said lease dependent and/or effective upon the contingency construction now sought by plaintiff.

And for a second and separate ground of defense, defendant alleges that said lease was drawn, originated and prepared by plaintiff; that if, at the time of the negotiations leading up to and/or the execution of said lease, plaintiff had in mind or intended that the effective termination date should commence to run from the contended for contingency, to-wit, cessation of "open and hostile warfare," that there was nothing to prevent plaintiff from covering, insisting or wording said lease.

And for a third and separate ground of defense, defendant alleges that cessation of "open and hostile warfare," would not eliminate the necessity and reasonableness of its contingencies either as to operations, and/or services and/or otherwise.

And for a fourth and separate ground of defense, defendant alleges that during its period of tenancy it has expended in improvements and repairs as of March, 1946, the amount of thirty thousand six hundred ninety-eight dollars and fifty-four cents

(\$30,698.54), and will be required to meet additional items of like nature in an undetermined sum.

And for a fifth and separate ground of defense, defendant alleges that said lease is based upon and involves the construction and interpretation by the divergent and sovereign powers of the world, and exclusively concerned or involved in or with war and post-war subject matters, resting solely between the authorized and legitimate governments of the United States of America and of the Japanese Empire and its people, effective only by duly approved and ratified treaties between said countries, and that the State of California is in no way a party concerned with any of the questions involved in this litigation.

And for a sixth and separate ground of defense, defendant alleges that it is a non-profit organization, a citizen, resident, and incorporated under and by virtue of the laws of the State of New York and not of the State of California; that plaintiff was and now is a citizen and resident of the State of California and was not and is not a citizen or resident of the State of New York.

That at all the times herein mentioned, defendant was and now is a citizen and resident of and incorporated under and by virtue of the laws of the State of New York and not at any time of the State of California, and that plaintiff was and now is a citizen and resident of the State of California and was not and is not a citizen or resident of the State of New York.

J. J. DOYLE,

Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Melvin Philbrick, being first duly sworn, deposes and says:

I am an officer, to-wit, the Port Area Executive of United Seamen's Service, Inc., a non-profit organization and corporation, defendant in the above-entitled action, and, as such, make this verification for and on behalf of said defendant; I have read the foregoing answer and I know the contents thereof, and the same is true of my own knowledge except as to matters therein stated on information or belief and as to those matters I believe it to be true.

/s/ MELVIN PHILBRICK.

Subscribed and sworn to before me this 3rd day of July, 1946.

[Seal] MARIE H. STANLEY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 20, 1947.

Receipt of Service of Copy.

[Endorsed]: Filed July 8, 1946.

[Title of District Court and Cause.]

OPINION

Plaintiff brings this action for declaratory relief and alleges in substance that on the 15th day of

September, 1943, plaintiff and defendant entered into a written lease covering properties known as 437, 439 Market Street in the City and County of San Francisco; that said lease provided that the term should commence on the 15th day of September, 1943, and "extend for a period of six (6) months from and after the cessation of hostilities in the present war with Japan." That by the words "cessation of hostilities in the present war with Japan," it is alleged that plaintiff and defendant intended to refer to the "cessation of open and hostile warfare as accomplished by the surrender of Japan on August 14, 1945," as distinguished from a "Presidential or Congressional declaration of the end of the war, which event has not yet occurred and may not occur for some years in the future." It is further alleged that a dispute has arisen between the respective parties as to the construction of the provision of the lease.

Plaintiff seeks a declaration of his rights, and for a judgment of this Court "specifically declaring that hostilities in the present war with Japan ceased on August 14, 1945, and that said lease by its terms ended and terminated on February 14, 1946 * * *."

The defendant, by its answer, places in issue the material allegations of the complaint and sets forth affirmatively that the lease in question was prepared by plaintiff and under the circumstances the language in question should be construed strongly against plaintiff; that defendant has expended approximately \$30,000.00 in improvements and repairs; that, in effect, the construction of the lease

involves a consideration of war and post-war matters in a national, rather than purely local sense.

The case was tried on an agreed statement, amplified in unimportant particulars by testimony. The factual background is of no aid to the Court in determining the legal issue involved. The problem presented resolves itself into a question of law based upon the language employed.

Plaintiff, in effect, asks for a judicial declaration "that hostilities in the present war with Japan ceased on August 14, 1945 * * *." Thus far, there has been no formal proclamation of either the end of the war or of the cessation of hostilities. It is not for this Court to make such a declaration.

On September 2, 1945, the President of the United States, as part of his official proclamation said: "As President of the United States, I proclaim Sunday, September 2, 1945, to be V-J Day—the day of formal surrender by Japan. It is not yet the day for the formal proclamation of the end of the war or of the cessation of hostilities."

There has been no "cessation of hostilities" or "end" of the war or termination thereof, by proclamation of the President. Nor has there yet been a resolution by Congress.

Under date of September 1, 1945, and before the Proclamation referred to, Hon. Tom Clark, Attorney General of the United States, rendered an opinion to the President concerning the then status of emergency legislation relating to the wartime powers of the Executive. The opinion is quoted in part:

“First of all, it should be borne in mind that the war powers of the President and the Congress do not automatically cease upon the termination of actual fighting. As the Supreme Court said in *Stewart v. Kahn*, 11 Wall. 493, at 507: ‘(The war power) * * * is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.’ See also *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146.

“The broad basis of governmental power on which the various emergency and wartime statutes rest cannot, therefore, be said to have been terminated by recent developments, including the unconditional surrender of our enemies. Questions do arise at the present stage, however, with regard to the time which the Congress has specified in individual statutes as being the termination date of the powers therein conferred. As will appear in the attached compilation, certain of the wartime statutes are made effective only ‘in time of war,’ or ‘during the present war,’ or ‘for the duration of the war.’ Still other expressions may be found of similar character.

“Speaking generally, I believe that statutes of the type just mentioned should be considered as effective until a formal state of peace has been restored, unless some earlier termination

date is made effective by appropriate governmental action. In *Hamilton v. Kentucky Distilleries Co.*, *supra*, Mr. Justice Brandeis, speaking for the Court said: 'In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace.' Again, in *Commercial Cable Co. v. Burleson*, 255 Fed. 99, 104, Judge Learned Hand rejected the contention that certain wartime powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added: 'Even if I were to assume that the power were only co-extensive with a state of war, a state of war still existed. It is the treaty which terminates the war.' See also *Kahn v. Anderson*, 255 U. S. 1, 10; *Ware v. Hylton*, 3 Dall. 199, 236; 22 Op. A.G. 190 (1898). It is perhaps unnecessary to add that the Congress can at any time, in response to charged conditions, repeal or amend any wartime statute or group of statutes.

"I turn to another group of statutes: those which are to be terminated 'upon the cessation of hostilities, as proclaimed by the President.' Speaking once more in general terms, I believe that a provision of this type should be interpreted to refer to a formal proclamation, issued after you have determined that the facts warrant such action. Any less formal action on your part would not in my opinion be given by

the courts the legal effect of terminating a war-time statute, in the absence of proof in the document itself that it was your intention so to do. See *Hamilton v. Kentucky Distilleries Co.*, *supra*."

On September 6, 1945, the President of the United States, in his message to Congress reiterated—"The time has not yet arrived, however, for the proclamation of the cessation of hostilities, much less the termination of the war. Needless to say, such proclamations will be made as soon as circumstances permit."

Plaintiff would require this Court to re-write the provision of the lease in question, and do violence to the actual language employed. The record is barren of any evidentiary support with respect to the "intention of the parties" and, accordingly, the problem must be solved in the light of Executive and Legislative events.

Hostilities may well have been suspended on August 14, 1945, but did not cease, nor was there a cessation in the sense in which that term is used. *Commercial Cable Co. v. Burleson*, 255 Fed. 99, 104, 105; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 St. Ct. 106.

Plaintiff places particular reliance upon *Kaiser v. Hopkins*, 6 Cal (2d) 537. In that case it appeared that the plaintiff petitioned the Superior Court for a writ of mandate to compel the defendant, Assessor of Los Angeles County, to grant him exemption from taxation in accordance with the provisions of

the State Constitution, wherein it is declared that "the property to the amount of \$1,000 of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war and received an honorable discharge therefrom * * * shall be exempt from taxation." (Art. XIII, sec. 11¼). Plaintiff, it appeared, served in the United States Army from May 13, 1919, to May 12, 1922. The sole question for determination was whether a soldier who enlisted and served after the Armistice of November 11, 1918, is entitled to the exemption provided for those who served "in time of war." However, it appeared, the words "in time of war" were given legislative interpretation. In Section 3612 of the Political Code of the State of California it is provided—"The following are recognized as wars within the intent and meaning of said section of the constitution: * * * War with Germany-Austria, April 6, 1917, to and including November 11, 1918."

The Court therein concluded: "Where two constructions can be placed upon a constitutional amendment and the legislature has enacted a law placing a reasonable construction upon the amendment, the courts will ordinarily follow the legislative construction."

In the case at bar there has been no legislative determination, Congressional resolution or Presidential proclamation with respect to the termination of the war with Japan.

The Attorney General of the State of California on September 25, 1945, in Opinion 45/277, concluded

that "duration clauses in California statutes such as 'cessation of hostilities', 'termination of war', etc., are operative and the statutes are still in full effect until a proclamation by the Governor or by the President or a resolution of Congress or of the Legislature establishes the date of their termination or unless the Legislature amends or repeals them."

By parity of reasoning, the provision in the lease that the lessee, defendant herein, should hold the premises for "a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred (\$400)" is operative and the said lease is still in full force and effect.

In view of the foregoing, there has been no termination of defendant's lease-hold interest, by operation of law, or efflux of time; the event, period, or time has not yet arrived when the term of six (6) months commences to run.

Findings may be prepared and judgment entered in favor of the defendant, United Seamen's Service, Inc., in accordance with the foregoing Opinion.

Dated: October 30, 1946.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Oct. 30, 1946.

[Title of District Court and Cause.]

STIPULATION RE FINDINGS AND
ORDER THEREON

It Is Hereby Stipulated between respective counsel, that findings are waived as to the allegations of Paragraph VI of plaintiff's complaint.

Dated this 4th day of December, 1946.

/s/ THEODORE M. MONELL,
Attorney for Plaintiff.

J. J. DOYLE,
Attorney for Defendant.

Upon such stipulation: It is so ordered.

Dated this 5th day of December, 1946.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Dec. 6, 1946.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on the 5th day of August, 1946, before the Court, without a jury, a jury trial having been duly waived by plaintiff and defendant, and Theodore M. Monell, Esq., appearing as attorney for plaintiff and J. J. Doyle, Esq., appearing as attorney for defendant, and from the evidence introduced the Court finds the facts as follows:

I.

That defendant was and now is a non-profit organization, incorporated under the laws of the State of New York and authorized to do and doing business in the State of California and in the City and County of San Francisco in said state.

II.

That plaintiff was and now is the owner of that certain building generally known, numbered and designated as 437-439 Market Street in San Francisco.

III.

That on or about September 15, 1943, plaintiff, through her representatives, drew and submitted to defendant a written lease, which was executed, whereby and wherein plaintiff leased to defendant all of that certain store, together with the basement thereunder, generally known as 439 Market Street, together with the entire second and third floors of said building, the entrance thereto being generally known as 437 Market Street in San Francisco, being the premises hereinbefore mentioned.

That said lease provided that same should commence, "For a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan."

IV.

That the oral, evidentiary, factual evidence, with respect to the actual language employed, in support of the "intention of the parties," is of no aid to

the Court in determining the legal issue involved; that its construction and interpretation is a question of law.

V.

That neither the President of the United States by proclamation, nor the Congress by resolution, has declared either the cessation of hostilities or the termination of the war.

VI.

That said provision in said lease is operative; that defendant is entitled to hold said premises, "For a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred Dollars (\$400.00);" that said lease is still in full force and effect; that there has been no termination of defendant's lease-hold interest by operation of law or efflux of time; the event, period, or time has not yet arrived when the term of six (6) months commences to run.

VII.

That defendant during its period of tenancy has expended in improvements and repairs as of March, 1946, the amount of Thirty Thousand Six Hundred Ninety-eight and 54/100 Dollars (\$30,698.54).

From the foregoing facts and as conclusions of law therefrom, it is held:

I.

"That there has been no cessation of hostilities or termination of the war.

II.

That said lease and the provisions thereof are operative; that defendant is entitled to hold said premises, "For a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred Dollars (\$400.00);" that said lease is still in full force and effect; that there has been no termination of defendant's leasehold interest by operation of law or efflux of time; the event, period, or time has not yet arrived when the term of six (6) months commences to run.

III.

That defendant is entitled to judgment together with costs and disbursements expended or incurred herein.

Let judgment be entered accordingly.

Dated this 23rd day of December, 1946.

GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed Dec. 23, 1946.

In United States District Court, for the Northern
District of California, Southern Division

No. 26171G

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC., a non-
Profit Organization,

Defendant.

JUDGMENT

This cause came on regularly for trial on the 5th day of August, 1946 before the Court without a jury, a jury trial having been duly waived by the plaintiff and defendant; and Theodore M. Monell, Esq. appearing as attorney for plaintiff and J. J. Doyle, Esq. appearing as attorney for defendant; and the Court made and filed herein its opinion and its findings of fact and conclusions of law, each separately stated and in writing.

Now, therefore, by virtue of the findings of fact and conclusions of law

It Is Hereby Adjudged, Decreed and Ordered that that certain lease, drawn, submitted and executed on the 15th day of September, 1943 is operative.

It Is Further Adjudged, Decreed and Ordered that defendant is entitled to hold said premises, "For a term commencing on the fifteenth day of September 1943 and extending a period of six (6)

months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred Dollars (\$400.00).''

It Is Further Adjudged, Decreed and Ordered that said lease is in full force and effect.

It Is Further Adjudged, Decreed and Ordered that there has been no termination of defendant's leasehold interest by operation of law or efflux of time; the event, period or time has not yet arrived when the term of six (6) months commences to run.

It Is Further Adjudged, Decreed and Ordered that defendant recover costs.

Done In Open Court This 23rd Day of December, 1946.

GEORGE B. HARRIS,
United States District Judge.

Approved as to form only.

THEODORE M. MONELL,
Attorney for Plaintiff.

J. J. DOYLE,
Attorney for Defendant.

[Endorsed]: Filed and entered Dec. 23, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that B. Samuels, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from

the final judgment entered in this action on December 23, 1946.

Dated: March 22, 1947.

/s/ THEODORE M. MONELL,
Attorney for Appellant
B. Samuels.

[Endorsed]: Filed Mar. 22, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above entitled Court, and to
United Seamen's Service, Inc., Defendant and
Appellee in the above entitled matter, and to
J. J. Doyle, Esq., its attorney:

You and each of you will please take notice, and
you are hereby notified that the plaintiff and appel-
lant in the above entitled matter hereby designates
the following matters to be contained in the record
on appeal of said appellant in said matter, to-wit:

1. The judgment roll in said matter, includ-
ing the opinion of the District Judge therein;
2. The entire transcript of the testimony
taken upon the trial of said matter;
3. All exhibits introduced in evidence; and
4. This praecipe and service thereon.

Said transcript shall be prepared as required by
law and the rules of this Court, and be filed in the
office of the Clerk of the Circuit Court of Appeals

for the Ninth Circuit within the time required by law and the rules of this Court.

Dated: April 21, 1947.

/s/ THEODORE M. MONELL,
Attorney for Appellant.

The undersigned attorney for appellee in the above entitled matter hereby acknowledges service of the above praecipe this 21st day of April, 1947, and hereby consents that said appeal may be heard upon said transcript above designated.

Dated: April 21st, 1947.

/s/ J. J. DOYLE,
Attorney for Appellee.

[Endorsed]: Filed April 22, 1947.

[Title of District Court and Cause.]

ORDER ENLARGING TIME

Good cause appearing therefor, It Is Hereby Ordered that the time within which the Transcript of Record in the above matter must be filed with the Clerk of the Circuit Court of Appeals is hereby enlarged and extended to and including June 10, 1947.

Dated: May 1, 1947.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 1, 1947.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of B. Samuels, Plaintiff, vs. United Seamen's Service, Inc., a non-profit organization, Defendant, No. 26171 G, as the same now remain on file and record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.10 and that said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of May, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26,171-G

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC.,

a non-profit organization,

Defendant.

Before: Honorable George B. Harris, Judge.

Monday, August 5, 1946, 2:00 o'clock p.m.

Appearances:

For the Plaintiff Theodore M. Monell, Esq.

For the Defendant: J. J. Doyle, Esq.

PROCEEDINGS

The Clerk: Samuels versus United Seamen's
Service.

Mr. Monell: Ready, Your Honor.

Mr. Doyle: Ready, Your Honor.

The Court: Counsel, will you state the appear-
ances for the record.

Mr. Monell: Theodore W. Monell, appearing for
the plaintiff.

Mr. Doyle: J. J. Doyle, representing defendant.

Mr. Monell: Has Your Honor had any oppor-
tunity to look at the pleadings?

The Court: Yes, I have.

Mr. Monell: You know, then, what the issues are?

The Court: You might state them generally.

Mr. Monell: This is an action for declaratory relief involving an interpretation of the clause in the lease which determines the expiration date thereof. I would say that is practically the only point in issue between the parties, because, whether the matters of difference which are attempted to be set up are material or not, I would be willing to stipulate as to the facts upon Mr. Doyle's assurance they are facts.

It is our contention, which Your Honor has probably gathered from reading the pleadings, that the lease specifically provides it commences on the 15th day of September, 1943, and extending to a period of six months from cessation [2*] of hostilities, and that the lease terminated six months therefore, from and after August 14, 1945, which was V-J Day.

As part of our proof, I would like to offer in evidence the original lease, dated September 15, 1943, by B. Samuels, the plaintiff in this action, to United Seamen's Service, Incorporated, a non-profit organization, in the State of New York, executed between lessor and lessee, and with the corporate seal impressed. I ask that be admitted as Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Doyle: No objection.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Very well, the lease may be admitted in evidence as Plaintiff's Exhibit 1.

(The lease referred to was marked Plaintiff's Exhibit No. 1.)

Mr. Monell: I should like also to read in evidence the Proclamation of the President of the United States, dated August 18, 1945, in which he states:

"The war lords of Japan and the Japanese armed forces have surrendered. They have surrendered unconditionally. Three months after victory in Europe, victory has come in the East.

"The cruel war of aggression which Japan started eight years ago to spread the forces of evil over the Pacific has resulted in her total defeat. [3]

"This is the end of the grandiose schemes of the dictators to enslave the peoples of the world, destroy their civilization, and institute a new era of darkness and degradation. This day is a new beginning in the history of freedom on this earth.

"Our global victory has come from the courage and stamina and spirit of free men and women united in determination to fight.

"It has come from the massive strength of arms and materials created by peace-loving peoples who knew that unless they won, decency in the world would end.

"It has come from millions of peaceful citizens all over the world—turned soldiers almost

over night—who showed a ruthless enemy that they were not afraid to fight and to die, and that they knew how to win.

“It has come with the help of God, who was with us in the early days of adversity and disaster, and who has now brought us this glorious day of triumph.

“Let us give thanks to Him, and remember that we have now dedicated ourselves to follow in his ways to a lasting and just peace and to a better world.

“Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby appoint Sunday, August 19, 1945, to be a day of prayer.

“I call upon the people of the United States, of all [4] faiths, to unite in offering their thanks to God for the victory we have won, and in praying that He will support and guide us into the paths of peace.

“I also call upon my countrymen to dedicate this day of prayer to the memory of those who have given their lives to make possible our victory.

“In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

“Done at the City of Washington this 16th day of Aug., in the year of our Lord nineteen hundred and forty-five, and of the Independence

of the United States of America the one hundred and seventieth.

[Seal] HARRY S. TRUMAN.

By the President: James F. Byrnes, Secretary of State.

(F. R. Doc. 45-15120; filed Aug. 17, 1945, 11:25 A.M.)”

The Court: Have you that excerpt?

Mr. Monell: I have a typewritten copy.

The Court: Have you any objection to that being incorporated? I should like to have it in the record.

Mr. Monell: I think, as a matter of law, Your Honor would probably take judicial notice under Section 1875 of the Code of Civil Procedure, inasmuch as it is a public and private act of the Executive Department of the Government, and the public and private acts of the Executive, Legislative and [5] Judicial Departments of this State and the United States of America, the courts take judicial notice of pursuant to that section. That is Subdivision 301875.

Mr. Doyle: I see that the document has been identified, and in response to Your Honor's question, may I, through Your Honor, ask Counsel a question?

The Court: Yes.

Mr. Doyle: Do you contend, Mr. Monell, that the document from which you have just read is merely a victory proclamation, or do you contend that this is the termination or cessation of hostilities between the peoples of Japan and this country?

Mr. Monell: I contend this is a statement of the President of the United States of America as to the ending of a war as of a prior date.

Mr. Doyle: To which we object as incompetent, irrelevant and immaterial, not binding on the Court, and not determinative of the issues. We still maintain our Armed Forces in Japan.

The Court: I will allow the proclamation to go into evidence.

(The proclamation referred to was marked Plaintiff's Exhibit No. 2.)

Mr. Monell: I also wish to read the statement of President Truman on August 14, which was, in fact, V-J Day. This was the text of the President's statement: [6]

"I have received this afternoon a message from the Japanese Government accepting unconditional surrender and the Allied forces have been ordered to cease firing.

"I deem this reply a full acceptance of the Potsdam Declaration which specified the unconditional surrender of Japan."

On the same date, August 14, 1946, Secretary of State Byrnes addressed this message to the Swiss legation in Washington, D. C.:

"I have the honor to inform you that the President of the United States has directed that the following message be sent to you for transmission to the Japanese Government"— [7]

The Court: May I ask what you are reading from?

Mr. Monell: I am reading from the San Francisco Chronicle of August 15, 1945.

The Court: Have you any means of determining the authenticity of the statement?

Mr. Monell: This is a copy of the President's statement, the text of his statement, and also of Secretary Byrnes' statement, if the Court please. I haven't the index to the official reports, but——

The Court: May I ask Counsel whether or not a stipulation may be entered into with respect to the text of these several proclamations emanating from the President of the United States? Otherwise, some means must be provided for this Court to have authenticated copies.

Mr. Doyle: Yes, Your Honor.

The Court: I had thought that you gentlemen had virtually stipulated to the salient or essential facts in the case, and the matter before the Court would be one of law and interpretation of those facts. However, if there be divergent views on the facts, we should know at this stage.

Mr. Doyle: Your Honor, I did not want to interrupt Counsel, but Your Honor asked Counsel for an opening statement on the matter, and as I understand Counsel's presentation, it includes not only his views, but also an offer of evidence.

The Court: My intention was to have you give me a [8] narrative, generally of the issues involved and of the evidentiary matters to be presented, and you would proceed accordingly. The lease I accepted in evidence because I assume that is the basic document.

Mr. Monell: I was merely resting on these declarations of the President and the declaration by Acting Governor Howser on August 14, and the declaration of V-J Day, and was going to rest on that, because I think it is a matter of the construction of the language of the document in line with these other statements made by the Executive Officers of the State and of the Country.

Mr. Doyle: I have no objection to the document you have heretofore referred to. I see there is a seal on it. It is designated "A Victory Proclamation." I have no objection to that for what it is worth, but as to the newspaper article, I cannot go along with that.

Mr. Monell: Are you objecting to the presidential statement of August 14?

Mr. Doyle: Yes, I don't think it is determinative of the issues here.

The Court: Have you completed the general outline of what you expect to prove in this case?

Mr. Monell: That is correct, Your Honor.

The Court: So far as the legal issues and admissibility, it is my recollection there were several Los Angeles cases, [9] and I don't know whether you are going to refer to them in this case, but we will meet the legal issues at the proper time, but I want to clarify all factual matters.

Mr. Doyle, have you any statement to make at this time?

Mr. Doyle: Yes, Your Honor, insofar as the defendant is concerned, we propose to establish by

evidence the circumstances surrounding the execution of the lease on September 15, 1943, upon which is based the present controversy. We expect to establish by competent evidence that the lease on this, to be introduced was prepared by the lessor and the plaintiff in this instant action, or, more correctly, the plaintiff's agents in this instant action.

We expect to prove to Your Honor the background, the past, the present and the future, of the inception, the continuance up to the present time and in the future of the defendant corporation. The fact we expect to prove is that it is a charitable or a non-profit organization.

We expect to prove, in view of the lease executed here, that the defendant corporation has expended in excess of \$30,000, depending upon the facts involved and the length of the war, the post-war situation, and the fact that the defendant corporation initially was formed at the instance and at the request of the United States Maritime Commission, the War Shipping Administration, and the funds therefor came initially from those agencies and from the employers and from [10] the unions, themselves, for the purpose of providing some place, not only for the merchant seamen during the war, but after the war, and that the need of the merchant seamen at the present time continues; and at no time was it intended by the defendant corporation that the yardstick for the measuring pertained to the signing of the surrender on board the USS Missouri.

We do not believe that the date began to run from the signing of the surrender on board the Missouri

at all. We expect to show after that evidence is in, from the history of post-war situations, from the Civil War and World War I, that the question of the end of the war, or, using the exact words involved in this litigation, the matter of the cessation of hostilities is a political and governmental act to be determined by the respective powers themselves, and not to be interpreted by the courts. And, upon the facts and the evidence we expect to ask for a judgment.

The authors we will submit to Your Honor are very clear on the proposition that one country is occupied by the forces of another country, that that is still a question of hostilities.

The Court: Reference might be made to the case you have on this matter.

Mr. Monell: The California case is *Kaiser versus Hopkins*, in 6 Cal. 2d, 537. That was an action by a veteran [11] to obtain the exception of \$1,000 to which veterans were entitled under the Taxing Statutes. The particular veteran had served in the Army from May 12, 1919 to 1922. The Armistice was signed on November 11, 1918, but Congress did not declare the war over until 1921, and the Supreme Court, in banc, adopted the opinion of Mr. Justice Wood, who wrote the opinion in the District Court of Appeal, because that opinion contained a correct statement of the law.

It was stated in that case:

“When the armistice was effected on November 11, 1918, the conflict between the United States and Germany-Austria came to an end.

All the war activities ceased, never to be renewed. It is true, as argued by plaintiff, that we were technically at war until July 2, 1921, during which time the peace commissioners negotiated the final terms of settlement, but in the minds of the people the war was over. A spirit of rejoicing swept the land, business cares were laid aside, people danced in the street and engaged in numerous impromptu celebrations. The young men of the nation were recalled from war, from the battlefields where their lives had been endangered. In commemoration of the ending of the great war the day of the armistice was established as a legal holiday. When at a later date the people, in appreciation of the great sacrifices made by the soldiers [12] in leaving their homes and occupations to suffer the privations and dangers of war, amended the Constitution to grant them certain tax exemptions, they doubtless did so to reward those who served in time of actual war and not those who served in time of actual peace, to reward war service and not peace service. Application of the rules above set forth to the present situation leads to the inevitable conclusion that the voters used the words in question in their 'ordinary and common acceptance', and that they intended to exempt those only who had served during the period of actual conflict."

In this case there was a Political Code provision which defined the terms of war from April 6, 1917,

to and including November 11, 1918, but the opinion was not based solely on the Political Code. It was based solely on the terms of war.

The Mississippi case is not based on any statutory period for the purpose of the exemption statute. It was an identical proposition, the case being cited in 172 N.E. 218.

I would also like to introduce in evidence——

The Court: Counsel, first, are there any stipulations that may be entered into? I think I have the factual background fairly well in mind.

Mr. Doyle: The lease in question was prepared——

Mr. Monell: By myself. [13]

Mr. Doyle: I am not prepared to go that far, Mr. Monell.

The Court: I asked you for any stipulation. If we cannot get them by stipulation, we will have to take evidence.

Mr. Monell: Will you stipulate August 14 was V-J Day, at which time the shooting was stopped?

Mr. Doyle: I will stipulate on August 14, 1945, a surrender document was executed on board the USS Missouri by the representatives of the then Empire of Japan and the United States of America.

Mr. Monell: That is not the fact. It was signed on September 1. August 14 is when the shooting stopped, and that is when the celebrations were had. That is when the orders of "cease fire" were given by the Navy.

The Court: Is that the day referred to in the proclamation?

Mr. Monell: No, this day is the day of prayer.

Mr. Doyle: Mr. Monell, the Court asked for a stipulation, and I will stipulate the lease, which you propose or eventually will introduce in evidence, was prepared and sent to the defendant corporation for signature, but it was your lease and the defendant corporation executed the lease.

Mr. Monell: Will you also stipulate as to August 14 being V-J Day?

The Court: Do you enter into that stipulation?

Mr. Doyle: Yes, I accept that. [14]

The Court: We are going along swimmingly, Counsel. We have been here 25 minutes with one stipulation.

Mr. Monell: Will you stipulate August 14 was V-J Day at which time Naval officers gave the orders to "cease fire"?

Mr. Doyle: So stipulated.

Mr. Monell: Will you also stipulate that on September 1st, 1945, on board the USS Missouri, the formal document of surrender was executed between the then Empire of Japan and the United States of America?

Mr. Doyle: A formal document of surrender was executed—so stipulated.

Mr. Monell: That's all. Plaintiff will rest on those stipulations. For the purpose of cutting short the defense, I will stipulate——

The Court: Counsel, have you any testimony to offer?

Mr. Monell: No, the stipulations are sufficient. The plaintiff will rest.

Mr. Doyle: Do I take it now that you desire——

The Court: Counsel, I don't want any misconception of the record, or misinterpretation of any matters had under discussion. Objection was made to the reading of the newspaper article on the ground that it was hearsay. There is a stipulation covering the subject-matter you were seeking to elicit through the medium of the newspaper article.

Mr. Monell: That is correct. [15]

The Court: There was no objection to the proclamation you proposed to offer.

Mr. Monell: That is correct.

The Court: Therefore, a copy of the declaration may be received for the Court's benefit.

Mr. Doyle: You mean the newspaper copy?

Mr. Monell: No, the other.

Mr. Doyle: If Your Honor please, I desire to make the objection that the document introduced in evidence as part of the plaintiff's case, apparently, first in order, is merely a Victory Proclamation, is in no way determinative of the issues in the case, and is not binding on any of the defendants involved, and I object upon the further ground it is incompetent, irrelevant and immaterial.

The Court: I will allow it in evidence. You read it in evidence.

Mr. Monell: Yes, I read it in evidence. Plaintiff will rest.

The Court: Ultimately, Mr. Doyle, it is a question of interpretation, is it not?

Mr. Doyle: Yes.

The Court: The plaintiff rests?

Mr. Monell: That's right.

(Plaintiff rests.)

Mr. Doyle: At this time the defendant will, therefore, [16] move for a judgment of dismissal upon the following grounds:

On the stipulations heretofore entered into, they are incompetent, irrelevant and immaterial insofar as they concern the real point in issue. They are not determinative of the issues involved, and they are not binding on the corporation defendant.

Next, plaintiff's complaint, in which he seeks this declaratory relief judgment, particularly Paragraph IV, page 2, commencing line 15, is not proved under the stipulations entered into as part of plaintiff's complaint at all. There has been no stipulation and no evidence by stipulation, or otherwise, that any of the allegations of plaintiff's complaint have been proved by any testimony or evidence whatsoever.

(Thereupon the motion for judgment of acquittal was argued by the respective parties.)

Mr. Doyle: I will submit the motion, Your Honor.

The Court: Motion denied.

Mr. Monell: I might suggest, if Counsel would make an offer of proof, I might stipulate, to save time.

Mr. Doyle: All right. The defendant offers to

prove on or about September 15, 1943, the two individuals who were involved in the initial transaction involved subsequent to the execution of this lease, were Mr. Vincent Fallon and Mr. Don Fazackerley, and that gentleman at that time was the [17] Port Area Executive, and upon instruction of the defendant corporation, sites were checked in San Francisco that might be utilized for the occupancy of such a program for the United Seamen's Service that was formed to aid, and for the benefit, of merchant seamen;

That eventually the premises in question were found to be adaptable, and that thereafter, Mr. Fallon contacted Mr. Milton Meyer, and made known to him the fact that they were interested in a lease, and that either the plaintiff—I might say the plaintiff is B. Samuels, and Mr. Meyer is a real estate broker—that neither the plaintiff nor Mr. Milton Meyer prepared a lease and submitted it;

That Mr. Fallon was merely a Port Area Executive and had no experience in legal matters. The matter was referred to New York, the headquarters of the national organization, where the lease was signed and returned;

That the United Seamen's Service organization, as was pointed out to Mr. Meyer, was formed at the behest of the United States Maritime Commission and the War Shipping Administration for the specific and direct purpose of providing accommodations, and by that I mean lodging, meeting place and recreation halls in providing more or less of a social service program to merchant seamen;

That at that time it was known by Mr. Fazackerley that the United Seamen's Service, being formed at the behest of [18] the two organizations suggested by and contributed to by the unions in a very large measure, that the organization was to continue as long as there was a need for it, and the Union goes along with, and is practically in adjunct of, the United States Maritime Commission and War Shipping Administration;

That it was known at that time that the mere fact that this Country was agitating for an unconditional surrender by Japan——

The Court: When?

Mr. Doyle: Ever since the beginning of the war—and at the time the lease was executed that this Country would insist on an unconditional surrender with Japan, and also the fact that their program and services would have to continue in view of the large number of merchant ships and employees on those ships as long as there was a need for it, the need to be directed or suggested by War Shipping Administration, and the lease was signed and executed and sent in, and at no time did Mr. Meyer suggest to Mr. Fazackerley or Mr. Fallon, either directly or indirectly, in any manner, shape or form, that the six months mentioned in the lease was to be measured by what developed to be the signing of the surrender on the Missouri;

And that it was intended to keep these services as long as there was a need for the services, and there was no need either directly or indirectly to

measure the time that United [20] Seamen's Service should vacate or give up the lease.

There was another phase involved in this also, Your Honor, and that is this: That USS receiving those funds from public subscription and public contributions——

The Court: For the record, USS is United Seamen's Service.

Mr. Doyle: USS is the United Seamen's Service. As I say, receiving its funds from public subscriptions and public contributions, they could not under its policy, or they would not have contributed the amount that they did to improve and to maintain and to better this building in excess of \$30,000 if they knew there was going to be such a construction as now is insisted on by the plaintiff.

All these facts we will be able to prove.

Mr. Monell: I will stipulate to all but the question of the knowledge on the part of the plaintiff that the lease was to endure so long as there was any necessity for the United Seamen's Service, because we rest on the terms of the lease in that regard.

The Court: You may withdraw that.

Mr. Doyle: We will withdraw that and put a witness on.

Mr. Monell: Counsel stated that Mr. Fazackerley understood certain things. That would not be binding on the plaintiff, because his understanding as to the necessity for the United Seamen's Service was not within our information. [21] As to that, I could not stipulate, but as to the background of the

organization I am willing to stipulate, because I think it is immaterial for any consideration by the Court.

Mr. Doyle: Then the stipulation is accepted.

The Court: It is accepted by the Court. I think you gentlemen have accomplished a great deal in saving time.

Mr. Monell: I don't want to stipulate to the matter of the investment of defendant as being in consideration of any agreement on the part of plaintiff that there would be any extension of the lease beyond the stated term.

The Court: Very well. Call your first witness.

DON FAZACKERLEY

called on behalf of Defendant; sworn.

The Clerk: Q. Will you state your name to the Court. A. Don Fazackerley.

Direct Examination

Mr. Doyle:

Q. Your address, Mr. Fazackerley, please.

A. 1871 Mission Street, San Francisco.

Q. Mr. Fazackerley, do you know something about the United Seamen's Service, the defendant in this action?

A. I know a great deal about it, Mr. Doyle.

Q. When did you first become acquainted with the defendant corporation?

A. As I recall, it was in October, 1942.

Q. What was your connection with the defendant corporation at that time?

(Testimony of Don Fazackerley.)

A. Well, through several years prior to [22] that time I had an interest in the broad question of Merchant Seamen Welfare, and was approached by, first, the employee of United Seamen's Service who was assigned to this coast area, Mr. Philip Ketcham, in 1942, to develop a program for San Francisco, to develop a program for San Francisco, it being known at that time that this would be one of the principal war ports, and, in fact, had already become so. The merchant shipping was tremendously active at that time.

Q. Upon being so approached, did you accept?

A. I did, and proceeded to create an advisory committee, a lay body to get such a program under way, and soon after that it became quite obvious that we had to have professional help, and Mr. Fallon was then hired on a full-time basis to serve as the Port Area Executive.

Q. What did your committee consist of—briefly—I don't mean the names, but the class of men?

A. They were primarily representatives of shipping concerns, of maritime labor unions and of the Government agencies related to shipping, the WSA, the Maritime Commission, the Public Health Service, and then, a comparatively small number of people like myself who were just generally interested in the question.

Q. Did you subsequently confer with and assume an official capacity?

A. Yes, I did, I became first the Vice-Chairman

(Testimony of Don Fazackerley.)

of the committee, and later the Chairman, succeeding [23] Mr. Jerd Sullivan.

Q. When did you become Vice-Chairman of the committee?

A. I would say probably, April or May of 1943.

Q. Then, when did you become Chairman succeeding Mr. Sullivan?

A. Probably May of 1944.

Q. And as Vice-Chairman, what were your duties with USS?

A. Well, because Mr. Sullivan was a pretty busy fellow, I carried the ball for him in the administrative phase of the activity.

Q. Was the question of the type and length of services the defendant corporation was to render, and the length of time they were to be rendered, under discussion prior to the time there was any lease executed in connection with the premises in question?

A. No, there was no discussion that I am aware of.

Q. Are you familiar with the purposes and the policy of the defendant corporation as to continuance of its operation after it had been established?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. My understanding of the position of the United Seamen's Service was to perform such service for seamen as would be consistent with the need here in San Francisco, and that is about as far as

(Testimony of Don Fazackerley.)

it went. There had been no determinations or [24] time—even yet.

Q. (By Mr. Doyle): You are limiting——

Mr. Monell: I move to strike the witness' answer, following the words "My understanding."

The Court: That may go out.

Q. (By Mr. Doyle): What policy was determined by the governing committee of the defendant corporation as to the services and need of services, and the length or extension of services?

Mr. Monell: I object to this line of testimony as incompetent, irrelevant and immaterial. It is not admissible.

The Court: Objection sustained.

Q. (By Mr. Doyle): Is there presently a need for the operation of the defendant corporation?

Mr. Monell: Same objection.

The Court: Sustained. I think you covered part of this in your stipulation and offer of proof.

Mr. Doyle: Yes, your Honor.

The Court: This is repetitious, and I take it, on the offer of proof you had no objection to the necessity or need that the organization continue, Counsel.

Mr. Monell: As I say, excepting there was no agreement; it was no part of the agreement between the parties.

Q. (By Mr. Doyle): Was there anything ever communicated to you by anybody about the alleged termination date of this lease? [25]

A. No.

(Testimony of Don Fazackerley.)

Q. When was the first time that that subject arose?

A. Well, it arose early in this year when the question was raised by the combination of our Port Area Executive and this broker handling the property, Mr. Milton Meyer, and at that time statement was made that our lease, being no longer operative, and that a substantially larger rental could be obtained for the premises, we should make some plans to vacate. That was quite serious because the activity was continuing in war-related services.

Mr. Monell: I ask the last part of the witness' answer go out as to the nature of the activities.

The Court: The last part of the answer may go out.

Q. (By Mr. Doyle): So, then, you were on the premises from the effective date of this lease, and you have received no indication that the plaintiff or his agents desire that you vacate the premises before that date, is that correct?

Mr. Monell: May I have that question? I didn't understand it.

The Court: Read the question.

(Question read.)

A. Yes.

Q. (By Mr. Doyle): Do you know of your own knowledge whether it was ever contended at any time as to when the termination date should commence to run on this lease? [26]

(Testimony of Don Fazackerley.)

A. I don't understand your question, Mr. Doyle.

Q. Did you ever receive any statement or suggestion or inference from the lessor, the plaintiff's in this case, as to when——

The Court: The word "inference" may go out.

Mr. Doyle: Q. As to when the effective day of the termination of this lease was to begin to run.

A. No.

Mr. Doyle: No further questions.

Cross Examination

By Mr. Monell:

Q. Mr. Fazackerley, were you connected with United Seamen's Service at the time of the execution of this lease? A. Yes, I was.

Q. Did you have any negotiations with Mr. Meyer? A. Not directly.

Q. Did you have any discussion as to the rental, or any discussion at all as to the ending of the lease? A. No, I did not.

Q. Did you send the lease east, yourself?

A. No. Mr. Fallon of the staff of the United Seamen's Service did.

Q. Did you see the lease yourself?

A. I am quite sure I did.

Q. Was there any discussion about the length, as to cessation, or, rather, six months after cessation of hostilities in the [27] present war? Do you recall having any discussion with Mr. Meyer about that at all? A. No.

Q. There was no discussion at all? A. No.

(Testimony of Don Fazackerley.)

The Court: Q. Do you have counsel in the east? A. Yes.

Q. Lawyers?

A. Yes, we had a firm of attorneys.

Q. Do you recall the names of the lawyers?

A. I am sorry, I don't. Mr. Doyle might recall, because he was in touch with them.

Q. And the lease was forwarded to these lawyers?

A. The lease was forwarded to these lawyers, through the national headquarters of the United Seamen's Service. They turned it over to the attorneys.

Mr. Monell: Q. You don't know of your own knowledge they turned it over? It is hearsay?

A. Their statement was that they did.

Mr. Monell: I will take that as a fact.

That's all.

Mr. Doyle: That's all.

VINCENT MEHERN FALLON

called for the defendant, sworn.

The Clerk: Q. Please state your name to the Court. A. Vincent Mehern Fallon.

Direct Examination

By Mr. Doyle:

Q. What is your address, Mr. Fallon? [28]

A. 458 - 20th Avenue.

Q. You were formerly employed by the defendant corporation? A. Yes.

(Testimony of Vincent Mehern Fallon.)

Q. Can you tell us now about when it was that you were first so employed?

A. In March of 1943.

Q. Are you the gentleman who originally was thrown in contact with, or contacted Mr. Meyer about the premises now involved?

A. That's right.

Q. And the premises were checked by your organization and by you, is that correct?

A. Yes, although I was assisted in that with Mr. Philip Ketcham, the then Regional Director.

Q. Mr. Ketcham is no longer with the defendant corporation.

A. I am not sure—I don't know.

Q. Did you or your organization finally suggest to Mr. Meyer the preparation of the lease?

A. Yes, I think so. I think that is true.

Q. Did you subsequently receive a lease from Mr. Meyer? A. Yes.

Mr. Doyle: It is stipulated that is the lease in evidence, Mr. Monell?

Mr. Monell: So stipulated. A.

Mr. Doyle: Q. I take it you had your hands full at that time with the numerous details you were taking care of in San Francisco. [29]

A. That's correct.

Q. Did you, pursuant to the routine that existed at that time, this being a legal matter, refer the matter to the national office of the defendant corporation? A. Yes, sir.

(Testimony of Vincent Mehern Fallon.)

Q. Where is that national office?

A. 39 Broadway, New York.

Q. And the lease was referred to your national office in New York City for execution?

A. That's correct.

Q. And it was returned? A. Yes.

Q. Eventually it was, with changes?

A. Yes.

Q. And you, in turn, returned the original to Mr. Meyer, is that correct? A. Yes.

Q. During the time of any negotiations leading up to, and finally resulting in the execution of the lease in question—well, give us the conversation that you had with Mr. Meyer, if any, about his idea of the use of the words and what they meant, "Cessation of hostilities of the present war with Japan".

A. I am a little bit confused by your question, Mr. Doyle.

Q. Let me split it up, then: You had a number of conferences with Mr. Meyer?

A. Yes, several.

Q. And it was finally determined over some period that these premises were somewhat suited to the purposes of the defendant corporation?

A. That's right.

Q. It was finally determined to lease, is that correct? [30]

A. Yes, most of those conversations were as to what the owner was going to do, and helping to rehabilitate the property.

(Testimony of Vincent Mehern Fallon.)

Q. Did the subject of rehabilitating the property come up? A. Yes.

Q. Do you know of your own knowledge that the defendant corporation did rehabilitate this property? A. Yes.

Q. When you had your various conversations with Mr. Meyer about the length of time that the defendant corporation wanted these premises, did he ever tell you what he had in mind, or what he meant by "Cessation of hostilities in the present war with Japan", or did he ever tell you when they wished to consider, or would consider the date for the running of six months period of time?

A. No, I don't think he ever made a definite statement one way or the other. We thought of it in terms of the end of the war, and that is all either of us thought of, so far as I can recall. I know, for my part that is what I thought.

Q. Did Mr. Meyer ever discuss with you the use of the words "Cessation of hostilities in the present war with Japan"? Did he differentiate between an armistice or a peace treaty and the end of the shooting war?

A. No, there was no differentiation made.

Q. The subject was not covered with you at all, is that correct? A. Yes.

Mr. Doyle: Take the witness. [31]

(Testimony of Vincent Mehern Fallon.)

Cross Examination

By Mr. Monell:

Q. You say it was not for the end of the war: What do you think is the end of the war?

Mr. Doyle: I object to that.

The Court: Objection overruled.

Mr. Doyle: Withdraw the objection.

A. We used a terminology, I suppose you could call it, which, as I remember, was "Duration plus six months", and that to me meant the same as it meant to everybody else.

Mr. Monell: Six months after August 14?

A. No, I cannot say.

Q. From when?

A. Just "Duration plus six months".

Q. What does "Duration" mean?

A. Well, I don't know. I never thought of it. I, first of all, was entirely too busy trying to get my job done than thinking about the end of the war.

Q. There was no actual discussion between you and Mr. Meyer about when the lease would end?

A. No.

Q. Your testimony brought to mind something here: This lease was originally prepared and sent back by you and changed by the New York office, wasn't it? A. That is true.

Q. Do you recall what the change consisted of?

The Court: Have you the lease, Counsel? Show the gentleman the lease in question.

Mr. Monell: Pardon me. [32]

(Testimony of Vincent Mehern Fallon.)

Q. This is the executed lease—it may be stipulated to by Mr. Doyle—do you recall what the changes were that New York insisted on?

A. No, I don't. The lease, I recall was a different colored lease than this, and it had several clauses on white paper that showed up on the blue, you see, and they were stapled on.

Q. This is the Meyer form of lease. Was the other lease like this?

A. The other was a blue form, it seems to me, but they sent it back and requested those changes to be initialed and returned to them.

The Court: At this time we will take the afternoon recess.

(Recess.)

Mr. Monell: Q. Mr. Fallon, during the recess you checked certain papers I showed you that made you recall there was a prior lease, but you don't know the reason for the change in that lease?

A. That's right.

Q. And the lease introduced in evidence was changed in accordance with the agreement of modification suggested by the home office, is that true?

A. That's right, I didn't pay much attention to it. It was sent back east to national headquarters who had legal advice.

Mr. Monell: That is all. [33]

Redirect Examination

By Mr. Doyle:

Q. Mr. Fallon, Mr. Monell asked you about

(Testimony of Vincent Mehern Fallon.)

your idea of the end of the war: when the lease was received in the San Francisco office and forwarded by you to New York to make any changes or express any views about the lease, or otherwise, did the national representatives make any inquiry as to the meaning of the end of the war?

A. I believe I used the term earlier "Duration plus six months". That was the common phraseology we used all the time, and in sending the lease back, I said, "Here is the lease and accompanying papers and estimates of construction work," and so forth. The lease issued was for the duration plus six months.

Q. Actually, those words were not used either in the lease or in any document that came back from New York? A. No.

Q. Did you attempt to be of any assistance or enlighten the New York office, or make any suggestion about the common acceptance of the end of the war, as to when the period should run?

A. No, I didn't think about it.

Q. In other words, very bluntly, that was none of your business? A. That's it.

Q. And you had your hands full of other details? A. That's right.

Mr. Doyle: That's all.

The Court: Does the record show the official capacity [34] of these gentlemen with respect to the defendant, United Seamen's Service?

Mr. Monell: He was the Port Area Executive.

(Testimony of Vincent Mehern Fallon.)

The Court: Q. What did those duties entail?

A. They entailed the over-all administration of welfare and social service programs for merchant seamen.

The Court: May the record show the actual time of occupancy prior to August 14, 1945.

Mr. Monell: The lease started September 15, 1943.

Q. Were you in possession at that time, do you know, Mr. Fallon?

A. As near as I can gather, we didn't enter the building until January 1944.

Q. Were you making improvements to the building at the time?

A. Yes, heater and fire escape, and so forth.

Q. Did you pay rent on September 15 according to the terms of the lease?

A. That I am not sure. I think there was an agreement, but it was between our New York office and the owner of the building regarding the rent that would be charged if we did not get it at a certain time. It was told to me—to be fair to both sides—I am not sure of it exactly.

Mr. Monell: That's all.

Redirect Examination

By Mr. Doyle:

Q. What was the condition of the building when USS, the defendant corporation, finally decided to lease?

A. It was horrible. [35]

(Testimony of Vincent Mehern Fallon.)

Q. And were considerable improvements necessary? A. Yes, indeed.

Q. And you constructed a fire escape?

A. Yes.

Q. And when I say "You," you had the fire escape installed? A. That's right.

Q. On the exterior of the building?

A. That's right.

Q. You had a heating plant in the building installed?

A. We had to purchase new equipment—three new heaters.

Q. That was purchased and installed?

A. Yes.

Q. And upon the lease, it was up to you people to make these installments?

A. There was an agreement between the owner and ourselves that they would stand the liability in part for some of it.

Q. Who stood for the other part?

A. We did.

Q. The defendant corporation?

A. That's right.

Mr. Doyle: No further questions.

Mr. Monell: No questions.

The Court: The record reveals the fact that the gentleman on the stand did not have any conversation with Mr. Meyer who appears to have represented the owners.

Mr. Monell: He did have a conversation with Meyer.

(Testimony of Vincent Mehern Fallon.)

The Court: But he did not have any conversation concerning the subject of the inquiry.

Mr. Doyle: I think there is a little bit more than that. There was no conversation with Mr. Meyer as to what he, Mr. [36] Meyer, had in mind, or what this gentleman had in mind as to the terminology or use of the language in the lease prepared by the plaintiff.

Mr. Monell: You will stipulate the plaintiff, Mr. Samuels, never appeared or saw anyone connected with the defendant in this matter, that the defendants dealt with Mr. Meyer.

Mr. Doyle: If you tell me that.

Mr. Monell: So stipulated.

MELVIN PHILBRICK,

called as a witness for the defendant, sworn.

The Clerk: Will you state your name to the Court? A. Melvin Philbrick.

Direct Examination

By Mr. Doyle:

Q. Your residence, Mr. Philbrick?

A. 1449 7th Avenue, Oakland.

Q. Your occupation?

A. Port Executive, United Seamen's Service.

Q. You succeeded the previous witness in that capacity? A. That is true.

Q. When did you assume those duties?

A. September 14, 1944.

(Testimony of Melvin Philbrick.)

Q. And you are presently active as such?

A. That's true.

Q. Mr. Philbrick, during the time that you have been so acting in connection with the defendant corporation's business, have you met Mr. Meyer?

A. Oh, yes. [37]

Q. On numerous occasions?

A. No, several.

Q. Did you have any conversation with Mr. Meyer about the terminology presently being debated in this court?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial. This is 1944, and the lease was entered into in 1943.

The Court: When are you applying these conversations?

Mr. Doyle: I want to find out as many as they had.

The Court: When?

Q. (By Mr. Doyle): When did you have these conversations?

A. General conversations, you mean?

Q. Yes, sir.

A. On several occasions when the plumbing went bad, or certain aspects of the building maintenance were in question which we felt that the landlord was at least partially responsible, we talked to Mr. Meyer. He came over on several occasions and he pointed out these various things.

(Testimony of Melvin Philbrick.)

Q. These conversations would be prior to your assuming the position as Port Executive?

A. That is true.

Q. When did you assume that position?

A. September 19, 1944.

Q. From that time did you have any conversation with Mr. Meyer about what it was intended these words were to mean, or what they were intended to convey?

Mr. Monell: Same objection.

The Court: I will sustain the objection.

Mr. Doyle: It is acquiescence, your Honor. [38]

Mr. Monell: Mr. Doyle, all you want to show is that there was no discussion as to the date?

Mr. Doyle: Yes.

Mr. Monell: I will stipulate there was no discussion until some time early in this year. We contend the lease expired six months after August, 1945, and there was no discussion about the period by either party.

Q. (By Mr. Doyle): When did you have a discussion this year with Mr. Meyer about the lease?

A. About February or March of 1946.

Q. Of this year? A. This year.

Q. What was the conversation about at that time, about the lease?

A. I think I can recall it to mind if I start at the beginning. It won't take long. We had a meeting in Los Angeles.

Q. Who did?

(Testimony of Melvin Philbrick.)

A. The Port Executives of the Pacific Coast, Seattle, Portland, San Francisco and San Pedro where we operate United Seamen's units. The question was, the shooting part having been over, we were determining needs and what certain units would be needed to be closed and others to continue, and in order to make plans we were asked at that meeting to review our leases and determine just where we did stand. So when I returned from Los Angeles I went to see Mr. Meyer, calling him on the phone and I told him I wanted to come in and talk about our lease, so as soon as I entered his office, [39] and before I had a chance to sit down, he said, as near as I can recall, "Your lease has expired and we would like to have you out of there." He said, "Our owner has been offered" oh, I believe the figure he mentioned was \$1,000 a month for the property we now had, and that was the first time Mr. Meyer and I ever discussed the lease.

Q. At that time did the question come up as to what he meant by that? A. No.

Q. Even at that time he did not contend such a contention as is being raised now?

Mr. Monell: I object to that.

The Court: I will sustain the objection. Reframe your question, Counsel.

Mr. Doyle: What, if anything, did he state on that occasion about the terminology of the lease as to the day that your time was beginning to run?

A. I just made a flat statement, and these were

(Testimony of Melvin Philbrick.)

his words, "Your lease has expired and we want you out."

Q. Did he say on what he based that?

A. No.

Q. He did not make any contention as to the basis of his proposition to you?

Mr. Monell: I object to the form of the question.

The Court: Sustained.

Q. (By Mr. Doyle): When you did have this conversation with Mr. Meyer, did he state to you, or elaborate to you, or indicate [40] to you what—

Mr. Monell: You have "indicate" in there.

Q. (By Mr. Doyle): Did he state to you what he meant by using the words "Cessation of hostilities in the war with Japan"?

A. I don't recall he did.

Q. (By the Court): Did you at any time receive a written notice of termination?

A. No, sir.

Cross-Examination

By Mr. Monell:

Q. In this meeting with Mr. Meyer, it was before March 1st? A. I believe it was.

Q. March 1st, 1946? A. Yes.

Q. At that time he discussed with you a renewal or extension of your lease to the end of December of this year, at a rate of \$150 greater than that covered by your present lease.

A. We discussed the thing, and as I said, I was

(Testimony of Melvin Philbrick.)

disturbed, because I knew the things we were doing and I hadn't finished, and when he said our lease was over with and he wanted us out, I plead with him, I think that term can be used, telling him that we were doing important work and we wished to continue. Mr. Meyer was sympathetic and understanding, but he said he had a responsibility to the owner of the building, and I recognize that. He said that they had this offer, and I [41] believe he mentioned \$1,000, but he did say he would see what could be done and let me know. Several days later I called him and I said, "Let's talk some more." I went over and he said he had talked to the owner and that the owner was willing to extend that period until the end of this year, 1946, providing the rental was increased by the amount of \$150.

Q. And also you were going to agree that certain installations and personal property would be surrendered with the premises at that time?

A. We discussed what would be left and what would be taken, and drew up a supplemental statement.

Q. And those papers were sent by you to the home office, and that is when the home office said, "You already have a lease. You don't have to do anything," and this suit was brought to clarify the position of all parties.

A. That is correct.

Redirect Examination

By Mr. Doyle:

Q. In this general port area conference at Los

(Testimony of Melvin Philbrick.)

Angeles, that was more of a general check-up, is that right? A. Yes.

Q. For the Port Area Executives in different parts of the country? A. That is true.

Q. When the matter was referred to your national headquarters in the New York office, you got instructions from your attorneys in New York as to the lease in question, is that [42] correct? In other words, you sent the papers on to home in New York. A. Mr. Dunne.

Q. The New York office sent it over to your attorneys and then back here, is that right?

A. That is about it. I don't remember exactly who started raising the questions, but it didn't take long for somebody with more knowledge along those lines than I to figure out there might be some question involved.

Q. As a matter of fact, during the regime you had down there in that capacity, is it not a fact that the defendant corporation has expended in excess of \$30,000 about the building and premises?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial.

The Court: That fact would not aid the Court in interpreting the clause or phrase involved here.

Mr. Doyle: I appreciate that, but I wish to submit it for whatever it may prove to be worth in determination of the matter by the Court, because as I understand from the correspondence with the attorneys in New York, that they being dependent upon the public for funds to operate this place,

(Testimony of Melvin Philbrick.)

would not be pouring \$30,000 into a structure after which they might find themselves out in the street when the need was still great. They would not have authorized \$30,000.

The Court: I will allow it for the limited purpose of [43] indicating the extent to which moneys were used in furnishing or refurnishing the premises in question, and certainly, not to disclose the intent in the minds of the parties.

Q. (By Mr. Doyle): Is that not a fact?

A. The fact is, a good percentage of that money was spent before my term of office and part of it since.

Q. You have checked your books?

A. I have checked my books.

Q. And that sum of money has been spent by the defendant corporation for improvements?

A. Yes.

The Court: You would distinguish between improvements and operating expenses?

Mr. Doyle: Very definitely.

Q. So there will be no question about that, what does the \$30,000 consist of?

A. Mr. Fallon mentioned the heating and the hot water, and a part of the heating and the fire escape the owner paid half. We recovered all of the floors, the basement and main floor and two additional floors, completely repainting, and put in a lot of structures and partitions and things that might be usable in other types of activity; in other words,

(Testimony of Melvin Philbrick.)

permanent improvements. It is all permanent stuff. Lighting was a big factor and all those things will be left in the building.

Q. Have you a governing committee in San Francisco? A. Yes, sir.

Q. And you report to New York?

A. Yes, sir. [44]

Q. Do you sit in on the governing committee in San Francisco? A. Yes, sir.

Q. And the chairman of the governing committee is Mr. Fazackerly? A. Yes.

Q. During the time you have been Port Executive, was it your duty in that capacity to handle all the business affairs that involved the USS in San Francisco? A. That is correct.

Q. And initiate it? A. Yes.

Q. And you, depending upon what the subjects were, referred them to Mr. Fallon, or sent them on to New York? A. Yes, sir, that's right.

Q. At any time have you received any notice, directly or indirectly, oral or written, to the effect that the lessor considered the lease inoperative, or that you were served with any notice of tenancy eviction at any time? A. No.

Mr. Doyle: That's all.

Recross-Examination

By Mr. Monell:

Q. Mr. Philbrick, this \$30,000 of improvements, didn't you state the conditions about the premises were rather deplorable when you went in?

(Testimony of Melvin Philbrick.)

A. No, that was Mr. Fallon who made that statement.

Q. Were you connected with the United Seamen's Service on September of 1943? A. No.

Q. Are you at all familiar with the condition of the building at that time?

A. Only from what I have heard. [45]

Q. Then, you don't know how much of the money was spent to recondition the building and make it fit for occupancy? A. Yes, by our bills.

Q. Approximately how much of the \$30,000 was used for that purpose? A. All of it.

Q. There was no lighting equipment, no heating equipment, no hot water equipment, part of which you say was paid by the owner, all of which the United Seamen's Service had to put in in order to occupy the building?

A. That is the way I understand it.

Q. That was the time before you actually occupied it.

A. In order to make it available to occupy?

Q. Yes. A. Yes.

Q. That was known in advance by the officers of the United Seamen's Service?

A. They didn't know exactly how much it would be. They knew a rather heavy expenditure would be necessary because of the run-down condition of the building.

Q. That was open; there was nothing secretive about that? A. No.

Q. At the time of your discussion with Mr. Meyer, in February of 1946, did you state to him

(Testimony of Melvin Philbrick.)

that you did not think the lease had yet expired, or you disagreed with his construction of the terms of the lease?

A. No, I don't think so, Mr. Monell. Not being a lawyer, and as I say, being startled by his comment, I don't think I made any rebuttal contesting it. [46]

Q. As a matter of fact, you sent the papers east expecting to come back signed, didn't you?

Mr. Doyle: Just a minute. I object to that.

The Court: I will sustain the objection. I think we should have certain reasonable limitations here.

Mr. Monell: That's all.

Mr. Doyle: That's all.

The Court: This may be the subject of a stipulation, but did the papers in question include a memorandum of extension, or what were the papers in question?

Mr. Monell: The lessor prepared an extension of the lease under which there were three additional clauses, increasing the rent from \$400 to \$550 a month, and certain additional property was to be surrendered by the lessee, and under "C", anything contained in the attached lease, the lease as extended will terminate on December 1st, 1946, and they were supposed to sign that, and it was sent back and was not signed because of this difference of opinion as to the termination date.

The Court: And thereafter followed the litigation.

Mr. Monell: That's all.

JACK KAMAIKO

called as a witness for the defendant, sworn.

The Clerk: Please state your name to the Court.

A. Jack Kamaiko. [47]

Direct Examination

By Mr. Doyle:

Q. Mr. Kamaiko, what is your address?

A. 35 Orange Street, Brooklyn, New York.

Q. Are you connected with the defendant corporation? A. I am.

Q. In what capacity?

A. I am Field Representative from the national office.

Q. As Field Representative of the national office, what, generally are your duties?

A. I am responsible for the supervision of all units in the United States.

Q. You have duties in New York, traveling duties? A. That is correct.

Q. And in the course of your duties, eventually, I presume you visited the premises of, and supervised operations of the defendant corporation.

A. The United States, yes, sir. I just want to indicate we have two divisions of the organization. We have a domestic and foreign operations director.

Q. Which division do you belong to?

A. Domestic. Of course we are familiar with the others, but that is our responsibility.

Q. Did you feel you are somewhat familiar with the operation of the USS in San Francisco?

A. I have spent quite a bit of time here, and I am quite familiar with it. [48]

(Testimony of Jack Kamaiko.)

Q. How long have you been connected with the defendant corporation? A. Since May, 1943.

Q. In the establishment of the operations which are under your jurisdiction, upon what was the establishment and the continuance based upon?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial, if your Honor please.

The Court: What is the purpose, Counsel?

Mr. Doyle: The purpose is the showing of the need of the continuance of this operation at this location.

The Court: We may assume that there is a need. Otherwise the overtures would not have been made in connection with the renewals, and the conversations would not have occurred with Mr. Meyer. It does not appear directly in the evidence; it appears by necessary inference.

Mr. Doyle: Have you ever received any correspondence or any communication from the lessor or anybody on his behalf prior to this litigation, that the lease was to terminate six months after hostilities ceased with Japan?

A. Before I came through, I examined the correspondence of the national office and did not find any such communications.

Q. And during your visit to San Francisco, you never received any communication from Mr. Meyer at any time? A. No, sir.

Mr. Doyle: That's all. [49]

(Testimony of Jack Kamaiko.)

Cross-Examination

By Mr. Monell:

Q. Mr. Kamaiko, you say you examined the correspondence: Didn't you find a letter somewhere in the month of March of this year in which the statement was made by Philbrick, or someone connected with the organization in San Francisco that it was the contention of the owner that the lease had expired, and a request was made for certain documents of extension?

The Court: I understood the question stated "Prior to that time."

Mr. Monell: No, the question was prior to this suit.

The Court: Very well.

A. (By the Witness): We recognize the whole thing arose when Mr. Philbrick wrote in asking for approval of this extension. Prior to that time we had no knowledge of it.

Q. (By Mr. Monell): But on or about the first of March, that is the first you knew there was a contention made by the owner that the lease had expired?

A. I was not operating in the national office and would not be familiar with it.

Q. That is the first indication, that correspondence, that the contention was made that the lease terminated?

A. That is correct.

Mr. Monell: That's all.

Mr. Doyle: That's all. Defendant's case, your Honor. [50]

The Court: Have you any further evidence?

Mr. Monell: No.

The Court: Submitted on the evidence?

Mr. Monell: Submitted on the evidence and on stipulations.

The Court: Yes, submitted on the evidence and on stipulations. I think that this case is one that justifies a memorandum. I think if Counsel will prepare that, it will aid the Court rather than any extended oral argument. I have your views pretty well in mind and the stipulations and the evidence have pointed out the underlying problem fairly well to the Court. There is one item that apparently may or may not have been overlooked, and that is, in Paragraph VI of the complaint a prayer is made for \$300 attorneys fees in connection with the alleged breach.

Mr. Monell: I don't think there is any issue on that because the answer does not deny it.

The Court: There may be a point involved as a matter of law, whether or not a petition or complaint for declaratory relief is that character of action that could be contemplated in that.

Mr. Doyle: My recollection of Federal procedure is that if a plaintiff, under the Annotated Code, is put to a suit, and includes in the allegations of the complaint a prayer for attorneys fees, I think that is allowable. [51]

The Court: At least there is no objection.

Mr. Doyle: No objection.

The Court: Very well. 10-10 and 5, and if you want additional time, I will grant additional time.

CERTIFICATE OF REPORTER

I, Fred J. Sherry, Jr., Official Reporter, certify that the foregoing 52 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ FRED J. SHERRY, JR. [52]

[Endorsed]: No. 11630. United States Circuit Court of Appeals for the Ninth Circuit. B. Samuels, Appellant, vs. United Seamen's Service, Inc., a non-profit organization, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 14, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11630

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Appellee.

CONCISE STATEMENT OF POINTS ON AP-
PEAL AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF AND TO BE PRINTED

The appellant herein presents her concise statement of points on which she intends to rely on her appeal from the judgment in favor of appellee herein as follows:

Appellant commenced an action for declaratory relief against the appellee to have interpreted the provisions of a lease between appellant as lessor and appellee as lessee, which lease was executed on September 15, 1943, for a term of years commencing September 15, 1943, and (in the language of the lease)

“extending for a period of six (6) months from and after the cessation of hostilities in the present war with Japan.”

There was no agreement between the parties other than the lease itself and no discussion as to the meaning of the language employed.

It was, and is, the contention of appellant that, as a matter of law, the date from which the period of termination was to be computed was either August 14, 1945 (VJ Day) or, at the latest, September 1, 1945, the date of the signing of the formal surrender of Japan on the USS Missouri.

The Court below in its "Findings of Fact and Conclusions of Law" found, as a legal conclusion, "that there has been no cessation of hostilities or termination of the war" and "that said lease and the provisions thereof are operative"; "that said lease is still in full force and effect; that there has been no termination of defendant's leasehold interest by operation of law or efflux of time; the event, period or time has not yet arrived when the term of six months commences to run" and "that defendant is entitled to judgment together with costs and disbursements expended or incurred herein."

The judgment entered followed the language above quoted from the Conclusions of Law.

It is appellant's respectful contention that the learned Court below erred in each of the conclusions above set forth and in entering the judgment in accordance with said conclusions.

It is further appellant's respectful contention that the Court should have found, as a matter of law, that said lease expired six months after August

14, 1945, or, at the latest, six months after September 1, 1945.

Appellant hereby designates the entire record on appeal, certified by the Clerk of said District Court, as necessary for the consideration of the appeal and to be printed, including this document. All filing marks shall appear in the printed record, but the titles of court and cause, and names and addresses of attorneys, appearing above the captions, shall be omitted.

Dated June 2, 1947.

/s/ THEODORE M. MONELL,
Attorney for Appellant.

Receipt of a copy of the foregoing is hereby admitted this 2nd day of June, 1947.

/s/ J. J. DOYLE,
Attorney for Appellee.

[Endorsed]: Filed June 3, 1947.

No. 11,630

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

B. SAMUELS,

Appellant,

VS.

UNITED SEAMEN'S SERVICE, INC., a non-
profit organization,

Appellee.

APPELLANT'S OPENING BRIEF.

THEODORE M. MONELL,

Mills Building, San Francisco,

Attorney for Appellant.

FILED

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PAUL P. O'BRIEN,

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No. 11,630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC., a non-
profit organization,

Appellee.

APPELLANT'S OPENING BRIEF.

I. STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

This is an appeal from a judgment, of the United States District Court for the Southern Division of the Northern District of California, in favor of the defendant in an action for declaratory relief arising out of the construction of a provision in a lease between appellant as lessor and appellee as lessee.

The original complaint was filed in the Superior Court of the State of California in and for the City and County of San Francisco on June 17, 1946, and thereafter, pursuant to stipulation of the parties and proceedings to that end duly had and taken, said cause was removed to said United States District

Court and the papers were duly filed in said Court on July 2, 1946. (Tr. pp. 2-5.) The basis of the jurisdiction of the District Court in said matter is predicated upon diversity of citizenship, alleged in the complaint (Tr. p. 2), and the answer (Tr. p. 8) as provided by Title 28 U.S.C.A., Section 71.

Sections 225 and 861a of Title 28 U.S.C.A. vest in Circuit Courts of Appeals appellate jurisdiction in judgments of the character involved herein.

II. STATEMENT OF FACTS.

The general outline of the facts is presented very clearly in the pleadings and in the opinion of the Court below. The record shows that appellant leased to appellee certain premises in San Francisco for a period commencing September 15, 1943, and extending for a period of six months from and after the cessation of hostilities in the present war with Japan. (Tr. p. 3.) The appellee pleads as a defense the investment of some \$30,000.00 in improvements, and also that the termination of the lease could only be accomplished by political action of the nations involved, and not by the cessation of actual warfare. The testimony shows that there was no discussion whatsoever by any of the parties as to their understanding or interpretation of the language used. (Tr. pp. 49, 53, 54, 56, 72.) The parties stipulated that August 14, 1945, was V-J Day, at which time Naval Officers gave the orders to "cease fire". (Tr. p. 38.) It was further stipulated that on September 1, 1945,

on board the USS Missouri the formal document of surrender was executed between the then empire of Japan and the United States of America. (Tr. p. 38.)

It was also stipulated that the appellee corporation received its funds from public subscriptions and contributions. (Tr. p. 43.) It was further shown by the testimony that a portion of the expenses in improving the premises was paid by the appellant, although appellee expended a little over \$30,000.00 for that purpose. (Tr. pp. 58, 66.) The record also shows that the lease in question, although prepared by appellant, was examined by appellee and sent east to the office of its attorneys and certain modifications were suggested before execution of same. (Tr. pp. 49, 50, 52, 55.)

In addition, the evidence shows that prior to the filing of the complaint herein, the local office of appellee corporation had agreed upon a certain modification of the lease, and upon sending this modification to the home office the present dispute arose as to the construction of the lease, the local parties having theretofore been in agreement thereon. (Tr. pp. 64, 69.)

III. QUESTION PRESENTED.

The sole question presented is whether the language used in said lease is susceptible of the construction contended for by appellant; or, to express it specifically, whether a lease terminating upon a period after the cessation of hostilities in a particular war, without further provision, demands a formal, po-

litical, governmental or legal determination or declaration of such cessation as against the actual suspension of warfare itself.

IV. SPECIFICATION OF ERROR.

The lower Court erred in declaring that the lease of appellee has not terminated by operation of law or efflux of time, and that the event, period, or time had not yet arrived when the term of six months commenced to run.

V. SUMMARY OF ARGUMENT.

There is but one question presented, to-wit: Does a logical construction of the language of the lease call for a distinction between the cessation of hostilities and the formal ending of the war with Japan? Appellant respectfully urges the affirmative.

VI. ARGUMENT.

(a) OPINION OF LOWER COURT NOT BINDING ON APPEAL.

The question presented to this Court for consideration is purely one of law, and hence the decision of the Court below is not binding upon this Court (*Estate of Platt*, 21 Cal. (2d) 343, 352 [131 P. (2d) 825]; *Western Coal etc. Co. v. Jones*, 27 Cal. (2d) 819, 827 [167 P. (2d) 719]; *Trubowitch v. Riverbank Canning Co.*, 30 A.C. (June 24, 1947) 335, 339 [181 P. (2d)].)

(b) **THERE IS A DIFFERENCE BETWEEN "CESSATION OF HOSTILITIES" AND "CESSATION OF WAR."**

It is the contention of appellee that the war is not ended. Appellant admits this fact, but earnestly urges that the language employed in the lease herein involved refers to "hostilities" as distinguished from "war," and that the words used clearly illustrate the distinction because of the very association of the two words in the phrase employed. The lease does not purport to extend for a period of six months after merely the "cessation of hostilities" or "cessation of the war," but for six months "from and after the *cessation of hostilities in the present war with Japan.*" (Emphasis supplied.) The very use of the combination of these words indicates to appellant that the parties realized that the war could continue, although the hostilities therein had ceased, and that the two situations were not considered synonymous, as otherwise either of the phrases would have been eliminated in the preparation of the lease. It would seem that the only logical construction of the language used by the parties in order to give effect to each phrase (which is, of course, the duty of the Court in construing any contract) would be to say that the parties meant that upon the cessation of fighting the terminal period of the lease would commence, whether or not the war was formally still existing. Otherwise, the Court would do violence to the language used and would be rewriting the contract of the parties.

**(c) THE COURT WILL TAKE JUDICIAL NOTICE OF
HISTORICAL FACTS.**

There can be no serious argument that the actual hostilities ceased on V-J Day, being August 14, 1945. The Court, under Section 1875 of the Code of Civil Procedure of the State of California, Subdivisions 3, 5, and 8, will take judicial notice of the famous surrender declaration and the statements of President Truman and Acting Governor Howser on V-J Day as to the termination of actual combat, and that the news of Japan's "unconditional surrender" was public news on that day, and that the order to "cease firing" was issued on that day, almost too late, as Admiral Halsey was preparing at the very moment to bombard Tokio. This is a matter of history.

It is also a matter of history, of which the Court will take judicial notice, that on September 1, 1945, on the USS Missouri, the formal document of surrender was signed. This "Japanese Surrender Document" may be found as a Department of State Bulletin in United States Code Congressional Service, 1945, at page 1017. The language used in this document is so pertinent that we quote applicable portions thereof as follows:

"We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics,

which four powers are hereafter referred to as the Allied Powers.

“We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

*“We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith * * *.”* (Emphasis supplied.)

(d) THE DECISIONS SUPPORT APPELLANT'S CONTENTIONS.

There are but three authorities which appellant feels are directly upon the point here presented, although the opinion of the learned Court below disregards one of them, the California decision, specifically, and indirectly also disregards the Massachusetts decision upon which the California authority was predicated. (Tr. pp. 14-15.) The earliest case on the point arose out of the Civil War, and was not cited below as it had not been discovered by appellant at that time. Said case is

Nelson, Admr., v. Manning (1875), 53 Alabama 549.

In this case, a note for \$330.00 had been executed by defendant's intestate to plaintiff, payable

“on or before the first day of January, 1864, provided peace is by that time declared between the old United States and the Confederate States; but in no event is this note due or payable

until peace is declared and concluded, as above written.”

The Court charged the jury that the plaintiff was entitled to recover. The suit was commenced on February 15, 1866, and it was appellant's contention that the Civil War was not concluded until President Johnson's proclamation of April 2, 1866, or August 20, 1866, the first declaring that armed resistance had ceased everywhere excepting in Texas, and the latter that it had ceased there also, and that peace prevailed over the whole United States. It was shown that on December 15, 1865, the President had directed the provisional Governor of Alabama to surrender to the Governor-elect, and that the Governor had in fact surrendered on December 20, 1865, and his authority had expired.

The Court spoke as follows:

“A state of war no longer existed; the Confederate states were overthrown; allegiance and obedience was yielded to the Government of the United States; its Constitution and laws were the supreme law of the State, which each officer was sworn to obey and defend. That Government was without an enemy; and without enemies there can be no war. Every department of the State Government has so accepted and regarded the fact, and the records of this Court bear conclusive evidence of its recognition by the judiciary.

“The suit was not therefore premature; the date of payment had passed when it was commenced, and there is no error in the charge of the Court. The judgment must be affirmed.”

There is a more recent California decision upon the point which appellant feels is likewise determinative of the question here presented.

Kaiser v. Hopkins (1936, In Bank), 6 Cal. (2d) 537, [158 P. 1278].

In this action the plaintiff petitioned for a writ of mandate to compel the defendant assessor to grant him an exemption from taxation in the amount of \$1,000.00 allowed to every resident who had served in the army, navy, or marine corps "in time of war" in accordance with the constitutional provision. Plaintiff had served in the army from May 3, 1919, to May 12, 1922, and the question presented was whether a soldier who enlisted after the armistice of November 11, 1918, was entitled to the exemption for those who served "in time of war." It was conceded that the war was not technically concluded until July 2, 1921. The Supreme Court said, at pages 539-540:

"Our views are in accord with a decision of the supreme court of Massachusetts, where a case very similar to the one before us was considered. In that case the petitioner sought by writ of mandate to compel the granting of certain privileges under a statute which allowed the privileges to any person who had served 'in time of war'. In that case, as in our own, petitioner joined the army after the armistice. In denying the petition the court said: 'When the armistice was signed it was generally recognized that the war had come to an end. It was so considered by the President of the United States who, on November 11, 1918, addressing the two Houses

of Congress in joint assembly under the provisions of the Constitution, stated "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it." ' (Scott v. Commissioner of Civil Service, 272 Mass. 237 [172 N.E. 218].) "

In the course of its opinion the Court also mentioned that the legislature had defined the words "in time of war" to exclude the period following the armistice, but the above excerpt was given as an express basis of the opinion, the legislative declaration being merely an additional support therefor. Furthermore, the Massachusetts case (*Scott v. Commissioner*, 272 Mass. 237, 172 N.E. 218) upon which the reasoning above set forth is predicated is on all fours with the above case, the facts being almost identical excepting that the soldier enlisted but a few days after the armistice was signed. In the Massachusetts case there was no legislative determination defining the period of the war. The Court below chose to ignore the logic of the first basis of the Court's opinion and determined that the said decision was founded purely upon the legislative declaration. This conclusion, we earnestly submit, is erroneous, and a reading of the portion of the decision above quoted and the opinion in said Massachusetts decision clearly shows that the California Supreme Court was deciding first, as a matter of law, that the war (World War I) came to an end on November 11, 1918; and second, that the legislative declaration to that effect was proper. This is further more clearly demon-

strated by the first portion of the opinion appearing at page 538 where the Court said:

“It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it.” (Citing authority.) “It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed.”

This language shows clearly that the Supreme Court in California was considering the logical construction of the words “in time of war” just as we are here considering the logical construction of the words “cessation of hostilities in the present war with Japan.” The Supreme Court in the former instance held that the war ended with the armistice, and we are here contending that at least the “hostilities in the war with Japan” ended on V-J Day.

With all due respect to the learned Court below, we believe that the authorities cited in his opinion were entirely misconstrued, and that none of the cases has any application to the situation here involved. Each of the authorities presented must be considered in light of the problem there presented. Appellant feels that it is unnecessary to analyze each case for this Court, as a cursory reading will immediately show the inapplicability thereof to the facts at hand. The opinion of the Attorney General of the State of California cited (Tr. pp. 15-16) was referring in the main to statutes dependent upon gubernatorial or

presidential proclamation or resolutions of Congress. A statute which is dependent upon a "cessation of hostilities" alone would ordinarily be construed the same as a contract provision dependent upon "cessation of hostilities in a particular war" unless some basis for a different construction appeared and the Attorney General used as such basis other legislation adopted, which called for specific action by the governor, the president or congress. No such analogy may be drawn here.

VII. CONCLUSION.

Appellant respectfully submits that the Court below erred in its determination, and that its judgment should be reversed with instructions to decree that the lease terminated six months after August 14, 1945, and that judgment should be entered accordingly in appellant's favor, and for attorney's fees and costs to appellant herein, in accordance with the terms of the lease.

Dated, San Francisco,
July 21, 1947.

Respectfully submitted,
THEODORE M. MONELL,
Attorney for Appellant.

No. 11,630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

B. SAMUELS,

Appellant,

VS.

UNITED SEAMEN'S SERVICE, INC., a non-
profit organization,

Appellee.

BRIEF FOR APPELLEE.

J. J. DOYLE,

519 California Street, San Francisco 4,

Attorney for Appellee.

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B. SAMUELS,

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vs.

UNITED SEAMEN'S SERVICE, INC., a non-
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Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellee believes that an amplification of appellant's Statement of Facts may be of some assistance to this Honorable Court:

As soon as initial, local, pre and organizational multitudinous details permitted, Mr. Fallon, first Port Executive, was the individual originally thrown in contact with Mr. Meyer (appellant's agent) about the premises now involved.

Tr. p. 51.

Mr. Meyer subsequently forwarded a lease.

Tr. p. 51.

Mr. Fallon, pursuant to interoffice routine that existed at that time, this being a legal matter (the lease), referred the matter to the national office of appellee at New York City.

Tr. p. 51.

Appellant's agent (presumably) or attorney (no evidence or stipulation as to the latter),

Tr. pp. 37, 41, 43.

prepared and submitted lease in question; same forwarded to national office, executed, returned, and delivered to Mr. Meyer.

Tr. p. 52.

Appellant (not appellee) chose and used the words, "cessation of hostilities in the present war with Japan."

Tr. p. 53.

Appellant prior to, at the time of execution of the lease, nor until March of 1946, neither directly or indirectly, either orally or in writing, by inference or specification, added to or changed, defined or elaborated what appellant meant or what acts measured the words, "cessation of hostilities in the present war with Japan" or the national, international or legal aspect or effect which is so clearly and definitely shown by,

"Q. Did Mr. Meyer ever discuss with you the use of the words 'cessation of hostilities in the present war with Japan?' Did he differentiate between an armistice or a peace treaty and the end of the shooting war?

A. No, there was no differentiation made."

Tr. p. 53.

Further that,

“Q. There was no actual discussion between you and Mr. Meyer about when the lease would end?

A. No.”

Tr. p. 53.

That Fallon’s duties consisted of “overall administration of welfare and social service programs for merchant seamen.”

Tr. p. 57.

That Mr. Philbrick interviewed Mr. Meyer in February or March of 1946, who advised, and suddenly, and for the first time, “Your lease has expired * * * our owner has been offered * * * \$1,000.00 a month.”

Tr. pp. 61-62.

Appellee never received oral or written notice of termination.

Tr. p. 63.

That thereafter Mr. Meyer prepared a supplemental statement which was, as in the first instance, duly forwarded by Mr. Philbrick to the national office; whereupon Mr. Philbrick was advised by the national office, “You already have a lease. You don’t have to do anything.”

Tr. p. 64.

QUESTIONS PRESENTED.

The sole question presented is whether the (lessor's) language (chosen and used by appellant and not the subject of argument, definition, discussion, elaboration, meaning of "cessation of hostilities", negotiation or speculation) used in said lease is (not so much) susceptible of the construction (now) contended for by appellant (but whether the lessor having created by her own language an ambiguity, that said ambiguity should be construed and resolved against the party responsible therefor), or to express it specifically, whether a lease terminating upon a period after the cessation of hostilities (where the lessor has had the means and right to define and specify by whom, what, when, where and how the contingency to be effective and resolved) in a particular war, without further provision demands a formal, political, governmental or legal determination or declaration of such cessation as against the actual suspension of warfare itself.

Appellee's paraphrasing of appellant's question within parenthesis.

The additional questions are:

Any ambiguity in the language or phrase "cessation of hostilities" should be construed against the user, the lessor (the appellant), and not against the acceptor, the lessee (the appellee).

May an appellant, who being required not only to plead but to prove the allegations of her complaint, complain in the event of an adverse judgment where the evidence and transcript discloses her failure to conform to such rule?

If "cessation of hostilities" ended per appellant's contention, the lease provided for its termination by either act of the parties or by operation of law, and neither contingency having occurred, appellant and/or the Court may not substitute judicial processes.

Is not the question of war and peace, and necessarily "cessation of hostilities", political and not judicial?

Did the President's Proclamation of the 12th day of December, 1946 specifically declare "cessation of hostilities?" Did said Proclamation definitely establish the event, period or time from which the term of six (6) months (which is involved in this litigation) commences to run?

SUMMARY OF ARGUMENTS.

1. Appellant, through her representatives, having drawn and submitted to appellee a written lease which was then executed, may not now attempt to construe any alleged ambiguity of her own language to accomplish her own desired present purpose—to so permit, appellant would accomplish same, by her self-serving declarations and interpretations.

2. That appellant has failed to prove the allegations of her complaint.

3. That appellant neither pleaded nor attempted to prove the termination of her lease.

4. That "cessation of hostilities" is a political and not a judicial question.

5. That "cessation of hostilities" clearly, explicitly and specifically declared as of Noon, the 12th day of December, 1946, which document contains the event which commences and marks the beginning of the running of the "six (6) months from and after the cessation of hostilities in the present war with Japan."

ARGUMENT.

1. Mr. Meyer, appellant's agent, is an astute, prudent, successful and well educated business man, specializing in properties and their leasing and representing valued clients and interests in this area.

By the very nature of his occupation and even in spite of himself, that proverb,

"Make every bargain clear and plain
That none may afterwards complain."

necessarily, instinctively and deeply engrained, irrespective of any knowledge of law; the rules of construction, interpretation and the use of words and by whom.

In addition to the foregoing preliminary statement, the importance, ramifications and terribleness of World War II were intensely followed by all interested in their country's and/or personal survivorship.

The government of the United States of America as of the declaration of war with Japan on or about the 9th day of December, 1941, announced to the world, and repeatedly committed itself thereafter to

the complete defeat of Japan and the elimination of any and all hostile elements therein or any hostilities connected therewith, and appellee is unable to appreciate that as of the 15th day of September, 1943 (the date of the lease) that Mr. Meyer was unaware of such a completely definite course of action.

Mr. Meyer solely prepared the lease in question (not appellee) and the words, "cessation of hostilities in the present war with Japan," therefore, chosen and used by appellant and they were not the subject of argument, definition, discussion, elaboration, negotiation or specification, and in the absence thereof it therefore must necessarily follow:

AS TO THE LANGUAGE.

That if appellant in using words of disputed phrase, intended the now contended construction of, "cessation of open and hostile warfare," (quoted words taken from appellant's complaint, Paragraph IV) that appellant's failure raises the question that by reason of appellant's own act, who should suffer:

THE USER OR LESSOR, THE ACCEPTOR OR LESSEE.

In the absence of such clarification and failure, recourse must necessarily be to the only source provided—the Courts; or in other words, appellant had the power and right to decide the phrasing—failed to do so—forfeited the right and in so doing accepted the alternative—the common and universally recognized authority—the Courts.

POINTS AND AUTHORITIES.

“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”

1644 C. C.;

6 Cal. Juris. 284.

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.”

1654 C. C.;

6 Cal. Juris. 307.

“When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.”

1864 C. C. P.;

6 Cal. Juris. 307-309.

In support of cited and quoted basic code sections, appellee relies upon the leading case in the State of California (on a lease) in which the entire matter

and the law were thoroughly covered and reviewed and which has never been modified or reversed.

“Furthermore, if there be any doubt about the meaning of the two clauses in the instant case—if there be any ambiguity or uncertainty—that ambiguity or uncertainty must be resolved in favor of the lessee, the lessor being the scrivener. (Sec. 1654, Civ. Code.) This rule has long been enforced in grants and leases. One of the earliest pronouncements is contained in *Dann v. Spurrier*, 3 Bos. & P. 403 (127 Eng. Rep. 220): ‘Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative; from all of which the rule appears to be perfectly clear, that if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the latter.’ This rule was followed by our appellate court, and concurred in by the supreme court, in *Butt v. Maier Etc. Brewery*, 6 Cal. App. 581 (92 Pac. 652). The court was there construing the following clause in a lease: ‘At the expiration of this lease the said second party shall have the prior right to lease the same, said premises, for a further term of five years, for the rental sum of \$3,000 for the full term, payable at the rate of \$50.00 per month on the first of each and every month of said term. Provided, however, that if the said second party shall avail itself of that privilege, that then and in that event the said first party shall not be required to pay for any improvements at the end of said second term of five years, but that then, at the option of said first party, the said premises shall be surrendered to her with all improvements

thereon.' With reference thereto the court said: 'The word "prior", as used in Clause 2, does not qualify the right of renewal. The right given the lessee to lease for a further term of five years must necessarily be prior to the right of other parties to lease the property. As we construe the lease, it was optional with the lessee whether it made any improvements or erected any buildings upon the leased premises, or elected to renew the lease for a further term. If it erected buildings and the lessor exercises its option to demand the surrender of the leased property and offered to pay the value of such buildings, it was optional with the lessee to assent thereto, thus waiving its right to renewal, but there was no legal obligation so to do. Thus construed, there is no ambiguity in the provisions of the lease. If, however, *it be conceded that the lease is conflicting in its terms, or uncertain in meaning, then under the provisions of section 1654, Civil Code, it "should be interpreted most strongly against the party who caused the uncertainty to exist."* "The promisor is presumed to be such party." In this case, the lessor is the promisor. (Citing Cases.)'

Hence any 'conflicting terms' in the instant lease should be construed most strongly against Glenn, the appellant. As the supreme court of Pennsylvania has well said in *Kaufmann v. Liggett*, 209 Pa. 87 (103 Am. St. Rep. 988, 67 L.R.A. 353, 58 Atl. 129, 132): 'As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter, having the power of stipulating in his own favor, has neglected to do so, and also upon the prin-

ciple that every man's grant is to be taken most strongly against himself.' To the same effect, see *Fergen v. Lyons*, 162 Wis. 131 (155 N.W. 935, 937); *Gates v. Hutchinson etc. Co.*, 88 Wash. 522 (153 Pac. 322, 324); *Burgener v. O'Holloran*, *supra*."

(Italicized language italicized in the decision.)
Glenn v. Bacon, 86 Cal. App. 58-72(3), 260 Pac. 559.

AS TO THE COMPLAINT.

2. Paragraph IV, appellant's complaint, alleges:

"That by the words, 'cessation of hostilities in the present war with Japan'."

Tr. p. 3, Par. IV.

"Plaintiff * * * intended to refer to the cessation of open and hostile warfare."

Tr. p. 3, Par. IV.

"* * * and defendant intended to refer to the cessation of open and hostile warfare." (Italics appellee's.)

Tr. p. 3, Par. IV.

AS TO THE TRIAL.

APPELLANT'S EXPECTATION OF PROOF.

Appellant's attorney advised the trial Court in his opening statement:

"As part of our proof I would like to offer in evidence the original lease."

Tr. p. 27.

Same introduced and marked appellant's Exhibit I and a "Victory Proclamation" being introduced, marked appellant's Exhibit II.

APPELLANT'S ACTUAL PROOF.

Logically, legally and evidentially the only purpose of the lease and its introduction is to establish that it is the document containing the phraseology involved and necessarily the basis of this litigation. *

The controversial words do not in any manner whatsoever support, much less prove, the allegations that, "plaintiff and defendant intended * * * cessation of open and hostile * * *."

A careful review and consideration of standard definitionists, Funk & Wagnall, Webster, and others, discloses a marked difference between meaning of actual phrases and contended intention and interpretation.

Enmity—hatred (hostile) may frequently and usually (under circumstances of armed occupation) is outwardly non-existent, yet actually not only a live and dangerous possibility, but a probability.

Appellant's Exhibit II bears the caption—Proclamation 2660 (Victory—Day of Prayer).

"Cessation of open and hostile warfare" language or verbiage does not necessarily or at all mean that as a matter of fact that cessation actually occurred; this Honorable Court is required to take judicial no-

tice of official pronouncements of our Government as to sporadic fighting in the Orient and South Pacific, but more important, of acts of various nature against the occupation forces in Japan culminating in the plot to assassinate General Douglas MacArthur (such acts in the world's history have produced a resumption of war and/or prolonged final settlement—the nature of appellee's best program and services depends upon such contingencies) and therefore, obvious that such enmity and hatred against our armed forces has not resulted in the "cessation of hostilities" until officially pronounced by due constitutional, governmental act.

Therefore, it is submitted that:

"Cessation of hostilities in the present war with Japan" and

"Cessation of open and hostile warfare."

does not constitute coincidental or synonymous language.

Therefore, appellant's Exhibit I merely proved a lease—nothing more. If quoted phrases identical or synonymous, there would be neither dispute nor law suit.

If it be conceded (which it is not) that "cessation of open and hostile warfare" and "unconditional surrender" are, and mean the same thing, there was nothing to prevent appellant from using, "cessation of open and hostile warfare" or "unconditional surrender" upon the drawing of said lease.

Appellee respectfully directs this Honorable Court to the fact that appellant produced not one witness,

nor any evidence or testimony in support of the allegations of the complaint that, "Plaintiff * * * intended to refer to the cessation of open and hostile warfare", nor any evidence or testimony in support of the allegations of the complaint that, "And defendant intended to refer to the cessation of open and hostile warfare."

POINTS AND AUTHORITIES.

"Proof is the effect of evidence, the establishment of a fact by evidence."

1824 *C. C. P.*;

10 *Cal. Juris.* 674.

"Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

1868 *C. C. P.*;

10 *Cal. Juris.* 797.

"Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the ex-

istence of a document, the custody of which belongs to the opposite party.”

1869 *C. C. P.*;

10 *Cal. Juris.* 786.

“The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.”

1981 *C. C. P.*

Appellant's lease, while evidence, is no “evidence” in support of the allegations of appellant's complaint. The lease merely constitutes the document on which this controversy is involved and of itself only proves that there is a lease.

“There being no direct evidence introduced upon any issue the findings should be against the party who had the burden of proof.”

1981 *C. C. P.*;

Dieterle v. Bekin, 143 Cal. 683 (77 Pac. 664);

Monterey v. Cushing, 83 Cal. 507 (23 Pac. 700);

Connolly v. Hingley, 82 Cal. 642 (23 Pac. 273);

Leviston v. Ryan, 75 Cal. 293 (17 Pac. 239);

Golson v. Dunlap, 73 Cal. 157 (14 Pac. 576);

Speegle v. Leese, 51 Cal. 415;

Roncelli v. Fugazi, 44 Cal. App. 240 (186 Pac. 373);

Gallick v. Bell, 41 Cal. App. 52 (181 Pac. 808);

Miller v. Donovan, 3 Cal. App. 325 (85 Pac. 159).

“In substance the trial court found and concluded that the plaintiffs and those legally charged with them sustaining the burden had not proved payment by a preponderance of evidence.

The officers or employees of the appellant corporation who might have made such payments did not testify (this was not a case involving an appeal or ruling on the preponderance of evidence but a total lack of proving any evidence) and their failure to testify in person or by deposition was not explained. From these facts the trial court was entitled to infer that the primary evidence, if produced, would have been adverse.”

Roesch v. DeMota, 24 Cal. (2d) 563, 570, 571 (150 Pac. (2d) 422).

“We are thus confronted with the settled rule that when a party seeks relief, the burden is upon him to prove his case.”

Cal. Employ. v. Malm, 59 Cal. App. (2d) 322, 323 (1), 138 Pac. (2d) 744.

“The burden of proof is upon the party presenting the affirmative of the issue. If there is no evidence upon an issue, the findings should be against the party who has the burden of proof.”

Ellenberger v. City of Oakland, 59 Cal. App. (2d) 337, 339 (1), 139 Pac. (2d) 67.

It may not be overlooked that appellant first raised the issue herein, then filed her verified complaint; yet in support of the allegations thereof, in spite of the importance of the issue, Mr. Meyer, appellant's agent, could, should or would be the only individual who

could, should or would substantiate the allegation that, "Plaintiff and defendant intended to refer to the (cessation of open and hostile warfare)."

The failure to have the "benefit" of the presence and testimony of "the" witness in behalf of appellant can only mean one thing—that Mr. Meyer did not in fact, substance or words, negotiate a lease which appellant herself intended to refer to the "cessation of open and hostile warfare," as compared to the allegations that appellant and appellee both intended to refer to the cessation of open and hostile warfare.

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind:

6. That higher evidence would be adverse from inferior being produced."

1963 C.C.P. Sub. 6;

10 Cal. Juris. 761.

"The failure of a party to call a witness may give rise to adverse presumptions."

Robinson v. Western States, 184 Cal. 401 (194 Pac. 39);

Estate of Thomas, 140 Cal. 397 (73 Pac. 1059).

AS TO POSSIBLE TERMINATION OF LEASE BY ACT OF THE PARTIES (LESSOR—EVICTION) OR OPERATION OF LAW.

3. The lease, appellant's Exhibit I,

"* * * and will permit the lessor at any time after thirty (30) days to the expiration of this

lease to place upon said premises any usual or ordinary 'To Let' or 'To Lease' signs."

Eleventh paragraph.

No such signs requested to be placed nor actually put up.

"That in case suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant therein contained, on the part of the lessee to be kept or performed, the lessee will pay to the lessor a reasonable attorney's fee which shall be fixed by the judge of the court as part of the costs of such suit. Upon the filing of any action for unlawful detainer the court in which said action is pending may appoint a receiver without notice to take possession of the said premises and collect any rent that may be or become due from any sub-tenant and to hold the same during the pendency of said action."

Thirteenth paragraph.

"All notices required by law, or by this lease, to be given to the lessee may be given personally or by depositing the same in the United States mail, postage prepaid, and addressed to the lessee, No. 39 Broadway, New York, N. Y."

Sixteenth paragraph.

Appellant neither gave nor served any notice of termination of lease.

Tr. pp. 63-71.

"Any holding over after the expiration of the said term, with the consent of the lessor, shall be

construed to be a tenancy from month to month, and shall otherwise be on the terms and conditions herein specified so far as applicable."

Twenty-first paragraph.

"Notwithstanding any other provisions hereof, lessee may at the time of cessation of hostilities in the present war with Japan, or any time thereafter, terminate this lease by mailing to lessor, in care of Milton Meyer & Co., No. 50 Sutter Street, San Francisco, California, or such other place as may be designated by the Lessor, a notice of such termination, specifying the date thereof, which notice shall be mailed at least thirty (30) days prior to the specified date of termination."

Twenty-third paragraph.

Appellant neither gave nor served any such notice.

"A lease may provide for the termination of a leasehold on notice."

15 Cal. Juris 776, paragraph 193;

Conner v. Jones, 28 Cal. 59.

"Any such notice is controlling and supersedes the necessity for the notices prescribed by statute, the two sorts of notices being quite distinct."

15 Cal. Juris 776, paragraph 193;

Watkins v. McCartney, 57 Cal. App. 643 (207 Pac. 909);

Burnham v. Nicholls, 1 Cal. App. 266.

"It is a general ruling that the receipt of rent accruing subsequent to an act or omission entitling a landlord to declare a forfeiture with

knowledge of the facts is a waiver of the forfeiture.”

15 Cal. Juris. 787, paragraph 205;

German v. Golmer, 155 Cal. 683 (102 Pac. 932);

Jones v. Durrer, 96 Cal. 95 (30 Pac. 1027).

Admitted fact that appellee’s monthly rental regularly forwarded to appellant by check each month, accepted and cashed.

“Notice to quit is legal method of terminating tenancy.”

15 Cal. Juris 776, paragraph 193.

“Which notice is the initial step in the process of forfeiting the leasehold.”

Downing v. Cutting, 183 Cal. 91 (190 Pac. 455).

Appellant neither gave nor served notice of eviction.

AS TO DETERMINATION OF WAR OR PEACE (CESSATION OF HOSTILITIES).

4. The question of war and peace, and necessarily of cessation of hostilities, has been repeatedly held to be political and not judicial.

“The Congress and The President are the constitutional judges of states of war and peace and their decisions should be abided in patience by people and courts.”

U. S. v. Oglesby, 264 Fed. 691.

“War having been declared that condition must be recognized by the courts as in existence until the duly constituted national power of the country officially declares to the contrary even though actual warfare has long since ceased.”

Perkins v. Rogers, 35 Ind. 124-167;

Kneeland v. Mich., 207 Mich. 546 (174 N.W. 605);

Palmer v. Pokorny, 217 Mich. 284-288, 186 N.W. 505.

In the case of *United States v. Anderson*, 9 Wall. 56, 69, 70, it was attempted to be maintained and argued that the Rebellion (Civil War) was in point of fact suppressed when the last Confederate General unconditionally surrendered to the national authority, and that the period of limitation began to run from that date. It is to be noted that the Supreme Court held such a contention incorrect.

In the case of *Stewart v. Kahn*, 110 Wall. 493-507. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces, and carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. In this case it was held that in the matter of debt, “the cessation of hostilities and the end of the war was dependent upon the Congress.”

In *Hijo v. United States*, 194 U.S. 315-325, it was held that, “A state of war did not in law cease until the ratification in April, 1899 of the treaty of peace.”

“A truce or suspension of arms,” says Kent, “does not terminate the war, but it is one of the ‘*commencia belli*’ which suspends its operations.” It is thus established law from the Civil War and the Spanish American War, that cessation of hostilities depends upon Presidential or Congressional proclamation or enactment, that such in fact has actually come to pass.

It is interesting to note that such law was followed in the frequently cited case of *Hamilton v. Ky.*, 251 U.S. 146, as well as in *Kahn v. Anderson*, 255 U.S. 1-10, where it is held, “Even if I were to assume that the power were only co-extensive with a state of war, a state of war still existed to the treaty which terminates the war.”

The *Hamilton* case involved a World War I question.

Said World War armistice was signed on November 11, 1918. The Prohibition Act was passed and approved November 21, 1918 and the question was raised directly as to whether or not cessation of hostilities or the period of the war had not in fact ceased as of some ten (10) days prior to its approval and enactment, and the *Hamilton* case specifically holds that, “The conclusion of the war clearly did not mean cessation of hostilities.”

The very strong language contained in the decision in the *Hamilton* case does not stand alone, and appellee respectfully directs this Honorable Court's attention to another leading case, that is *Commercial Cable Co. v. Burleson*, 255 Fed. 99-104, where the

Court rejected the contention that certain wartime powers conferred on The President in the first World War had terminated with the armistice of November 11, 1918; also the *Commercial Cable Co. v. Burleson* case specifically states that there was no "cessation" in the sense in which that term is used.

In a comparatively recent case the following appears:

"The Emergency Price Control Act was not ended by virtue of cessation of hostilities between the armies of the United States and the enemy countries in 1945.

Syllabus 9,

In absence of specific provisions to the contrary, 'period of war' extends to ratification of treaty of peace or the proclamation of peace.

See Words and Phrases, Permanent Edition, for all of the definitions of 'period of war.'

Syllabus 11,

The cessation of hostilities between the United States and enemy countries did not end the war and a state of war still exists in absence of a formal treaty of peace.

In the absence of specific provisions to the contrary the period of war extends to the ratification of the treaty of peace or the proclamation of peace. *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 165, 40 S. Ct. 106, 64 L. Ed. 194; *Hijo v. United States*, 194 U.S. 315, 323, 24 S. Ct. 727, 48 L. Ed. 994; *The Protector*, 12 Wall. 700, 702, 20 L. Ed. 463; *United States v. Anderson*, 9

Wall. 56, 70, 19 L. Ed. 615. In the *Hamilton* case the same argument was made as is now made here, that the end of state of war should be construed as the time when actual hostilities cease and when the actual war emergencies cease, by reason of our complete victory and the disarmament of the enemy, coupled with the demobilization of our army and the closing of war activities. In that case (251 U.S. 146, 40 S. Ct. 112), the court said:

“ ‘Conclusion of the war’ clearly did not mean cessation of hostilities.’ To the same effect, *Zimmerman v. Hicks*, 2 Cir., 7 F. 2d 443, *Ex Parte Sichofsky*, D. C., 273 F. 694, *Miller v. Camp*, D. C., 280 F. 520. Under these authorities this court must reject the defendants’ contention that a state of war no longer exists between the United States and the enemy countries and that, on the contrary, emergencies which gave rise to the enactment of the Emergency Price Control Act of 1942 as amended are still existent and the Price Control Act continues to be in full force and effect.’ ”

Bowles v. Soverinsky, 65 Fed. Supp. No. 11, pp. 808-813.

It is to be noted that this case again refers to the *Hamilton* case and was decided May 20, 1946 (the instant suit filed June 17, 1946) and has not since been modified nor reversed.

“The clarity and continuity of the government with reference to cessation of hostilities is first disclosed when:

“On September 2, 1945, the President of the United States, as part of his official proclamation said: ‘As President of the United States, I proclaim Sunday, September 2, 1945, to be V-J Day—the day of formal surrender by Japan. It is not yet the day for the formal proclamation of the end of the war or of the cessation of hostilities’.”

Tr. p. 11.

This presidential proclamation (as to cessation of hostilities) again the matter of governmental concern when, and appellee quotes, “The Message from The President of the United States to The Congress of the United States, 79th Congress, First Session, House Document No. 282, United States Congressional Library, September 6, 1945” which message referred to the Committee of the Whole House on the State of the Union and ordered to be printed on page 9, in which it is stated:

“The time has not yet arrived, however, for the proclamation of the ‘cessation of hostilities’ much less the termination of the war.”

Underscoring of “not” is italicized in the message.

Very much in keeping with the two foregoing specific, executive, governmental action as to “cessation of hostilities,” same received an exclusive enactment on the matter and appellee quotes at length The President’s official proclamation.

“CESSATION OF HOSTILITIES OF WORLD WAR II

BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA

A PROCLAMATION

“With God’s help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o’clock noon, December 31, 1946.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 31st day of December, in the year of our Lord nineteen hundred and forty-six, and of the Independence

of the United States of America the one hundred and seventy-first.

By the President: Harry Truman

James F. Byrnes

The Secretary of State."

Appellee submits that the prayer of appellant's complaint seeking a judgment of the trial court,

"Specifically declaring that hostilities in the present war with Japan ceased on August 14, 1945, and that said lease by its terms ended and terminated on February 14, 1946."

Tr. pp. 4-10.

is relief which the judicial branch of our government may interpret if a question has arisen relative to "cessation of hostilities" after, only, or in the event that the executive or legislative branches of our government have first proclaimed and/or enacted pursuant to the laws as embraced in the Constitution of the United States of America.

Further, that under the record and laws involved in this case, that the trial Court has not erred.

In closing appellee desires to comment on the two cases cited by appellant.

In *Nelson, Admr. v. Manning*, 53 Alabama 549 at 542 speaking of the "construction of the instruments"—a promissory note—the Court states,

"If such a contract would be legal it must be expressed in clear and precise terms. It will not be derived from ambiguous, uncertain words or

words capable of clear or precise meaning in their usual signification * * *.

The intention of the parties is the thing to be ascertained in the construction of contracts, and in ascertaining it regard must be paid to the nature and character of the contract.

If its words are of doubtful meaning, they must be taken most strongly against the promisor.

Also, if it is susceptible of two constructions, that construction which will give it operation rather than that which will deprive it of all force must be adopted.

And if it is capable of two meanings, the one agreeable to and the other against law, the former must be followed."

And further, at page 552:

"It is in the making of peace by treaty between the belligerent powers which is the event—not the ratification of such treaty; but the declaration of peace—the cessation of hostilities, established and pronounced as a fact * * *."

It is further to be specifically noted that in said case, it is stated at page 552:

"On the 18th December, 1865 the President directed the Provisional Governor to surrender to the governor elect the office of governor, and his authority expired. On the 20th December, 1865 the surrender was made and from that day until it was superseded by the Reconstruction Laws, a government, the successor of the government ordained in 1819 prevailed in Alabama."

This situation is entirely different from the facts as to Japan and the United States. Neither The President nor The Congress has directed General MacArthur to surrender to anyone in Japan the authority or power of the United States; nor has General MacArthur individually attempted to assume such personal responsibility.

Nor has The President nor The Congress, nor General MacArthur, even as much as by implication, surrendered authority or power nor set any date for the expiration of any such authority or power.

In the *Nelson* case, as a matter of fact, by proclamation certain enactments and facts were set in motion and came to pass on the times set, which then permitted the marking of the period when the contingency occurred from which the time began to run.

This is not the situation in the instant litigation.

Appellant's next cited and relied upon case, as disclosed by her brief, is the *Kaiser* case.

Said decision discloses that:

"The state legislature in making provision for carrying into effect the constitutional exemption referred to in 1929 enacted a law by which the words, 'in time of war' were given legislative interpretation. The following are recognized as wars within the intention and meaning of said section of the Constitution."

Page 540 (3).

"Where a constitutional provision may well have either of two meanings. If the legislature

has by statute adopted one, its action in this respect is well nigh, if not completely, controlling * * * and does not violate the Fourteenth Amendment of the Constitution of the United States or of the State of California.”

Page 537 (3-4).

In the *Kaiser* case it was a matter of specific legislation already enacted and in the instant case there is yet to be specific enactment or legislation as to “cessation of hostilities.”

Appellee is unable to appreciate that appellant’s cited cases are in point.

Dated, San Francisco,

August 22, 1947.

Respectfully submitted,

J. J. DOYLE,

Attorney for Appellee.

No. 11,630

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

B. SAMUELS,

Appellant,

VS.

UNITED SEAMEN'S SERVICE, INC., a non-
profit organization,

Appellee.

APPELLANT'S CLOSING BRIEF.

THEODORE M. MONELL,

Mills Building, San Francisco,

Attorney for Appellant.

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APPELLANT'S CLOSING BRIEF.

Appellant will follow the outline adopted by appellee herein to present in logical sequence her reply to the additional contentions raised.

STATEMENT OF FACTS.

At page 2 and frequently in the course of its brief appellee makes mention of the fact that the lease in question was prepared by appellant. This is conceded, but it is also important to remember that the lease was first submitted to and approved by the local office of appellee, which then transmitted the lease to its head office and legal department, and that certain changes were suggested and made. (Tr. p. 55.) The

language defining the term of the lease was apparently satisfactory, as no question was raised with reference thereto at that time or until the local office sought approval of an extension of the term after the expiration of six months from the V-J date. (Tr. pp. 63-65.)

Appellee also states at page 2 that appellant did not raise the question of termination until March of 1946, whereas Mr. Fazackerley testified (Tr. p. 48) that the subject was discussed early in that year, Mr. Philbrick testified that Mr. Meyer discussed the subject about February or March, and at page 63 he stated that it was prior to March 1 that the discussion arose. This logically supports appellant's consistent position as to her construction of the lease. In other words, this question was not raised as an afterthought long after the expiration date, but appellant took the position that September 1 (the actual date of the formal surrender) was the date from which the six month period would be computed, although appellant earnestly believes that her rights commenced on August 14, the date when hostilities actually ceased.

ARGUMENT.

Appellant has no quarrel with the statements of appellee on pages 6 to 10 under the above heading, but seriously questions their applicability to the situation in hand. It is appellant's contention that the language used in the lease is not open to construction, but that it is simple and plain and susceptible of but one

interpretation. She believes that there can be no doubt as to the meaning of the clauses in the lease so that the rule of construction against the scrivener or lessor cannot be applied. There being no testimony showing conflict as to the meaning of the language or any special understanding of the parties, there is nothing left to do but to apply the law in construing the actual words employed, and hence there is no reason to adopt the rule contended for by appellee. There is no existing conflict in the lease itself, or to be drawn from the facts, which creates any uncertainty in ascertaining the meaning of the actual words appearing in the lease. Accordingly, there is no reason for construing the language against any person, but the duty of the Court is to give the language used its ordinary and accepted meaning, which is all that appellant is endeavoring to do.

The long excerpt from the opinion in *Glenn v. Bacon* (86 Cal. App. 58, 260 Pac. 559) appearing at pages 9 et seq. of Brief for Appellee, clearly illustrates the difference in the problem there presented and the one here involved. There an ambiguity was created by a conflict in the terms of the lease itself. There is in this instance only the matter of interpreting specific language used, and not any problem of making such language agree with any other terms employed.

AS TO THE TRIAL APPELLANT'S EXPECTATION OF PROOF
AND APPELLANT'S ACTUAL PROOF.

Under the above headings, from page 10 through 17, appellee advances contentions the applicability of which to the situation in hand appellant is unable to follow. The action brought is one for declaratory relief, requesting the Court to construe the meaning of language used in the lease. She alleges her construction and that claimed by the defendant and asks the Court to determine the matter. Obviously the only proof which is necessary for her to make is that a lease containing the disputed language was actually executed. This she did, and was entitled to rest her case. The pleading of the appellee indicated a divergence in the construction of the language used, and hence the issue was met by the introduction of the document containing the language in question. The failure of Mr. Meyer to testify is of no consequence inasmuch as the situation is merely left with the proof adduced by the defendant, to wit, that no discussion at all arose over the clause in the lease as to which the disagreement now exists.

The numerous authorities cited at pages 14 to 17 of appellee's brief are impressive, but none of these decisions is applicable to the situation here presented. They all involved situations where conduct of the parties or other evidence was available to establish the opposing positions of the litigants. We have none of that here. Both parties are in accord as to what happened and as to the very language used, but defendant is now attempting to apply some technical

construction of its own to the very simple and clear terms of the lease to distort its meaning. Obviously, if this litigation had been foreseen, other language could have been used to avoid the contentions now urged, but, just as clearly, appellee was in position to demand a clarification before executing the lease to establish beyond equivocation the contentions which it now urges. If other language had been employed, undoubtedly different arguments would now be advanced by appellee. Appellant sincerely believes that it would be difficult to employ simpler language to convey the meaning now urged by her in the construction of this lease. It is respectfully urged that the opinion of the Court below indicates that the issue was properly raised, and the decision itself, although adverse to the plaintiff, clearly shows that the Court considered that only a question of law was presented and that the Court disagreed with appellant's contentions. A clearer case of meeting the issue can hardly be imagined.

**AS TO POSSIBLE TERMINATION OF LEASE BY ACT OF THE
PARTIES OR OPERATION OF LAW.**

At pages 17 to 20, under the above heading, appellee again advances cogent arguments and cites numerous authorities upon points not even remotely involved in this litigation. It mentions the eleventh paragraph of the lease, permitting lessor to erect signs. There was no testimony upon this matter whatsoever. Quoting from the sixteenth paragraph, appellee mentions

that a provision is contained that notices required by the law or by the lease are to be given in a certain manner. It is respectfully urged that no notice of termination was required in this case by the terms of the lease or by law. The question of whether or not the lease has expired is the matter being presented to this Court for determination. Appellee also cites from paragraph twenty-third, providing that the *lessee* may give a notice of termination. Appellee states that "Appellant neither gave nor served any such notice". A reading of the paragraph indicates that this notice was one for the benefit of the lessee, and appellee was the party entitled to give such notice and not the appellant. There is no question but that when a lease provides for the giving of notice of termination, such provision is binding, and authorities to that effect cited by appellee establish nothing here, as no notice was necessary under the lease.

The record clearly shows (Tr. pp. 64, 69) that the parties had been discussing an extension of the term of the lease to December 31, 1946, and that this was covered by a writing acceptable to the local office of appellee and sent to its New York office, and upon the opinion of the New York attorneys for appellee this whole controversy became crystallized. There was accordingly no need to take any action by way of terminating the lease, as the parties had knowledge of the contentions raised by appellant in that regard.

As to the payment of rent by appellee as stated on page 20, nothing appears in the testimony to this effect, but the fact is that the rent was paid by ap-

pellee and accepted by appellant reserving full rights and without prejudice to the rights or positions taken by either party.

AS TO DETERMINATION OF WAR OR PEACE.

Commencing at page 20 of its brief, appellee begins to treat the real question involved in this matter. The authorities cited, however, are not decisive of the question here presented. Appellee apparently overlooks the fact that we have in this case a simple contract between parties providing for a lease to terminate six months after the cessation of hostilities in the war with Japan. The construction of this language is a matter of merely applying logic and reasoning to the words employed. The power of the President or Congress to declare cessation of hostilities or the ending of the war as political matters have nothing to do with determining what the parties meant by the simple words appearing in the contract executed by them. If the words "termination of war" had been used, appellant would concede that, in the absence of a special agreement or some circumstances showing a different construction by the parties, she would be in no position here to claim that the lease had even yet expired, but when the word "war" is preceded by the words "cessation of hostilities", then this attempted clarification should be given such reasonable and logical construction as to give working effectiveness to the clause as a whole. It is not necessary to determine when the powers of Congress or the

President may be exercised under limited acts giving either the power to terminate certain functions by making certain formal declarations. Naturally, if the termination of authority or the effectiveness of a statute depend upon certain action to be taken by the President or by Congress, such action is a prerequisite to such termination of authority or effectiveness of such statute. Such is not, however, the situation here presented. In this case the lease provides for its termination six months after the cessation of hostilities in the present war with Japan. It does not mention that this termination is to be determined by some prior declaration to that effect by the President of the United States or by Congress, and therefore the words must be given their normal construction that the lease is to terminate "when the shooting stops". This does not abuse the language used, but gives to each word its full measure of meaning and application in construing the document executed.

Proceeding to the cases cited by appellee, appellant presents the following thumbnail analysis demonstrating their inapplicability.

The first case cited is *United States v. Oglesby Grocery Co.* (1920), 264 Fed. 691. This case was reversed by the Supreme Court of the United States (255 U.S. 108; 65 L. Ed. 535) on the basis of *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89; 65 L. Ed. 516, 520, where the Supreme Court said:

"It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or nonexistence of a

state of war becomes negligible, and we put it out of view."

The case was reversed because of the uncertainty of the text of the act the violation of which was charged, but it will be seen from the foregoing language that the decision of the lower Court is no authority for any contention urged by defendant.

The next three cases are likewise inapplicable, as they merely hold that the "termination of a war" is determined by the declaration of the properly constituted authority. The case of *Perkins v. Rogers* (35 Ind. 126, 167) involved the tolling of the statute of limitations because of the existence of the Civil War and the case of *Kneeland-Bigelow Co. v. Michigan Central Railway Co.*, 207 Mich. 546, 174 N.W. 605, involved the power of the government to control the railroads after World War I and the Court there merely held that the war had not been concluded merely by the armistice but the governmental control continued until the war had been officially terminated.

In *Palmer v. Pokorny*, 217 Mich. 284, 186 N.W. 505, the Court was dealing with the specific performance of an agreement by Pokorny to hire plaintiff as manager of a hotel "until one year after the close of the present war (same to be determined when U. S. ceases to be a party in the war, and starts to recall and disband troops)" and to give plaintiff a lease, etc. Plaintiff brought an action for a lease, upon defendant's return from the war, and it was held premature as the peace treaty had not been ratified. It

is interesting to note in the opinion, as applicable here, the Court said at page 507:

“The armistice did not end the war; it terminated hostilities.”

It will thus be seen that this case supports the position of appellant herein rather than that of appellee.

The other cases cited are opinions of the Supreme Court of the United States, and all deal with the end of the “war” as distinguished from the cessation of hostilities therein, and in practically every case this distinction is noted. The cases arising out of World War I specifically mention that the signing of the armistice did not end the war but only terminated hostilities. We agree with that position and make no contention here that the war is over. We also concede that the war will not technically be over until such termination has been properly declared. We are not interested in the end of the war because the lease is to terminate after the “cessation of hostilities in the war”.

Appellee next cites the case of *Bowles v. Soverinsky*, 65 Fed. Supp. 808, decided in May of last year. This decision is not of the slightest assistance to appellee, and although not decisive, it is inferentially a strong authority for appellant’s contentions. The action was one by Chester Bowles as Price Administrator for an injunction to restrain the defendants from violating maximum price regulations, and among other things the defendants pleaded that since the ending of the war the Emergency Price Control Act was no longer

in effect. The Court in its opinion spoke as follows, at page 813:

“ ‘Cessation of hostilities’ is not equivalent to ‘end of war.’ ”

The Court then pointed out that the Emergency Price Control Act was effective until proclamation of the President or upon the date specified in a concurrent resolution of both Houses of Congress, whichever date was earlier, and that the Act had been continued in existence (at that time) until June 30, 1946. The Court then stated that the period of war extended to the ratification of the treaty of peace or the proclamation of peace, citing the *Hamilton* case mentioned by appellee (251 U.S. 146, 165; 64 L. Ed. 194), quoting therefrom the following statement:

“ “ ‘Conclusion of the war’ clearly did not mean cessation of hostilities.’ ”

It is very apparent from this decision that the Court considered that hostilities in the case then before it had actually ceased, but that in view of the language giving life to the Act, such fact was of no consequence. By analogy, accordingly, if the instant case had been before the same Court it would have decided that hostilities having ceased on August 14, 1945, the term of the lease would have expired within six months thereafter in accordance with the specific provisions to that effect.

Next, appellee refers to the message from the President of the United States to Congress, which may be found in 1945 United States Code Congressional Serv-

ice at page 1101, et seq. Apparently appellant did not read the speech, as it is quoting an isolated statement therefrom, and if the context be considered it will clearly be seen that the President was intending by the statement cited to mean only that the time has not yet arrived for him to proclaim the cessation of hostilities, etc., and thereby terminate legislation dependent upon such proclamation. That the President really believed actual warfare had ended is evidenced by a statement which appears at page 1102, in language as follows:

“The end of the war came more swiftly than most of us anticipated.”

Preceding the statement quoted by appellee appears the following:

“Certain of the wartime statutes which have been made effective ‘in time of war’, ‘during the present war’ or ‘for the duration of the war’ continue to be effective until a formal state of peace has been restored, or until some earlier termination date is made applicable by appropriate governmental action. Another group of statutes which by their provisions terminate ‘upon the cessation of hostilities’ or ‘upon termination of the war’ will in fact and in law terminate only by a formal declaration to that effect by the President or by appropriate congressional action.”

It is thus apparent that President Truman, in the portion of his speech quoted by appellee, was referring to the propriety of proclaiming a cessation of hostilities and thereby ending legislation depending upon such proclamation, and was not thereby advising or

intending to advise Congress that there was in fact no cessation of hostilities. In other words, all of the special acts granting war powers to the President are effective until a "termination of war", "cessation of hostilities", etc., as declared by some proclamation or congressional act.

It is further obvious that the declaration of President Truman on December 31, 1946 as to the cessation of hostilities was purely a statement for the purpose of terminating certain legislation dependent upon such presidential proclamation. It will be noted that such declaration contains the statement "although a state of war still exists", and that such statement is exactly in accord with the position of appellant herein, namely, that the cessation of hostilities connoted the continuation of the war itself.

Appellee next attempts to criticize the decisions cited by appellant in this matter, but appellant believes that such criticism is unjustified and that a reading of said decisions will disclose their decisiveness. It is conceded that the *Kaiser* case also mentions the legislative declaration as to the termination of the war, but that is not the sole basis of the decision, and furthermore, said decision is based upon the Massachusetts case (*Scott v. Commissioner*, 272 Mass. 237, 172 N.E. 218) as to which there was no such statutory declaration.

It is accordingly respectfully submitted that the judgment of the lower Court should be reversed with instructions to decree that the lease terminated six months after August 14, 1945, and that judgment

should be entered accordingly in appellant's favor,
and for attorney's fees and costs to appellant herein,
in accordance with the terms of the lease.

Dated, San Francisco,
September 8, 1947.

Respectfully submitted,

THEODORE M. MONELL,

Attorney for Appellant.

No. 11,630

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

J. J. DOYLE,

519 California Street, San Francisco 4, California,

*Attorney for Appellee
and Petitioner.*

FILED

FEB 9 - 1948

PAUL R. GIBSON
CL

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No. 11,630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC.,

a non-profit organization,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully submits that its petition for a rehearing by the Honorable Circuit Court should be granted for and upon the following reasons:

I.

The Circuit Court of Appeals has assumed certain facts to be in existence and has departed from the record before the Trial Court.¹

¹"Speed was vital and it may be ASSUMED * * * appellee was moved by a desire to speedily provide * * *." Opinion, p. 1, Par. 3.

Footnoted matters are outright assumptions and presumptions and are clearly and definitely based on CONJECTURE and SURMISE as to WHAT THE FACTS MAY HAVE BEEN, and are ENTIRELY WITHOUT BASIS OR PREMISES IN FACT OR IN LAW.

II.

The Circuit Court of Appeals in attempting to fortify its opinion (which so patently rests on assumed facts), errs. This the District Court avoided in its opinion and findings.²

The Circuit Court of Appeals has based its judgment upon "conditions subsequent", viz., the extent, nature and scope in not actual but its own interpretation of problematical maritime activities since the

Refer to testimony Rep. Tr. p. 30, lines 22-25; p. 31, lines 1-6 and to Transcript of Record pp. 52-53, also Rep. Tr. p. 31, lines 7-12, Transcript of Record, p. 57.

"The record does not tell us whether appellee anticipated the necessity of occupying the leased premises for a brief time or a long time after the shooting part of the war had ended." Opinion, p. 3, Par. 3.

Refer to testimony Rep. Tr. p. 49, lines 3-15; Transcript of Record p. 71.

"However it is a logical conclusion that in all PROBABILITY the major part * * * wartime functions would be more LIKELY to have been fulfilled six months after cessation of open and active fighting * * *." Opinion, p. 3, Par. 3.

Reference to any testimony impossible—this is the very matter that even appellee was unable to gauge or know. See hereinafter footnotes for further reference to this subject.

²"* * * the record is barren of any evidentiary support with respect to the 'intention of the parties' * * *." Opinion, Tr. p. 14. "That the oral, evidentiary, FACTUAL evidence with respect to the actual language employed in support of the 'intention of the parties', is of no aid to the Court in determining the legal issue involved; that its construction and interpretation is a question of law." Findings of Fact and Conclusions of Law, Tr. p. 18, Par. 4.

Missouri signing in its attempt to support its construction and interpretation of the lease contract.

This afterthought provides a fact predicate which was entirely non-existent in the Trial Court.

III.

The Circuit Court of Appeals has, by its assumption of FACTS alone, aided appellant in perpetrating an unconscionable wrong upon the United States Maritime Commission, the War Shipping Administration, United Seamen's Service, Inc., the seamen's unions and the seamen themselves; that each of said individuals and organizations, even at this very moment, is still engaged in necessary post-war merchant marine activities and problems and all the incidents thereof.³

The entire proceedings discloses a dearth of facts to which the Courts might allude as an aid in interpreting the lease contract as entered into between the parties. Thus both the Trial Court and the Circuit

³The official records of the Board of State Harbor Commissioners of the State of California, and the Marine Exchange of the San Francisco Chamber of Commerce, disclose that in 1945, August including December, merchant marine vessels arrivals and departures totaled 2878; in 1946, January including December, total arrivals and departures totaled 5557; and in 1947, January including December, total arrivals and departures were 3834. Any six months break down of the figures will disclose a high average volume of merchant marine shipping with which appellee was vitally concerned, and appellee will provide a further break down in the hereinafter footnotes. United Seamen's Service, Inc. in conformity to agreement and understanding with the United States Maritime Commission and War Shipping Administration, agreed to and did eliminate its operations as its needs were determined by them. Its domestic operations, including San Francisco, were terminated on December 31, 1947 and its overseas operations are still in existence and functioning.

Court of Appeals must interpret the contract in the light of the language used by the parties, which language had and continues to have a recognized meaning and construction by authorities, definitional and judicial, of most respectable weight.

The Circuit Court in its opinion, p. 3, Par. 3, italicizes, by way of emphasis, “cessation” and “in”. Appellee has likewise referred to Webster’s New International Dictionary and the definition of “cessation” therein is as follows:

“A ceasing or discontinuance as of action whether TEMPORARY or FINAL; a step; as of cessation of hostilities.”

Appellee desires to place before the Honorable Court as to what the position of the parties would be, and of the Courts as to the construction and interpretation of the word “cessation” if the cessation were temporary. Can there be any doubt or a denial that if the cessation was temporary, that an entirely different construction and interpretation other than that now given, would be correct? Therefore, in the absence of a specification in the definition as to the contingency being solely either temporary or final, instead of the alternative who is to determine whether or not the cessation is temporary or final, and who is to improve upon Webster and eliminate from the definition, “or final”? May the Honorable Court, therefore, logically or legally measure the construction and interpretation of “cessation” by ruling that the TEMPORARY appears to be actually final—there

being no condition or event establishing a so-called open outbreak or resumption of hostilities. This Court under the definition of hostilities may not forget or overlook that any conquered or subjugated peoples are humanly of such a nature as to be unable to eliminate antagonism or enmity although it may not necessarily be apparent or open—and therefore judicially the “final” may be disregarded.

“Temporary” and “final” are obviously not synonymous, and between the “temporary” and “final” appellee was not organized to act nor serve on any “temporary” basis, but rather until its services were no longer required. For the Honorable Court to hold that under the definition of “cessation”, the computation of the six months time began to run from a “temporary” cessation and to proceed to eliminate from consideration a final cessation, is to put the cart before the horse.

“Definitional distinctions between ‘cessation’ and ‘armistice’ appear non-existent, for Webster defines an armistice as, ‘a temporary cessation by mutual agreement, of hostilities’.”

“An armistice effects nothing but a suspension of hostilities. The war still continues. It is true that a war may end by the cessation of hostilities or by subjugation, but that is not the normal course, and *neither had hostilities ceased nor had the enemy been subjugated in the sense in which that term is used.* There were still military operations, the armistice had not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory, and

were in European and Asiatic Russia, where indeed, they still remain.”

Commercial v. Burleson, 255 Fed. Rep. 99-104-105.

How strikingly applicable and identical are the facts and the reasoning of Honorable Learned Hand, the District Judge in the *Commercial v. Burleson* case, to the very situation even as of this moment, to our present controversy, for it may not be denied that:

“It is true that a war may end by the cessation of hostilities * * * but that is not the normal course and neither had hostilities ceased * * * in the sense in which that term is used. There are still military operations * * * the armed forces of the United States are still in occupation of enemy territory (Japan), where indeed, they still remain.”

(Paraphrasing of *Commercial* decision by Appellee.)

IV.

With respect to the foregoing legal grounds the following excerpts are referred to wherein the Circuit Court of Appeals has departed from the record without basis, justification or reason.

“Speed was vital and it may be ASSUMED
* * *”

“* * * it is an EQUALLY TENABLE CONCLUSION that the parties did NOT THEN SERIOUSLY CONCERN THEMSELVES with
* * *”

“It may fairly be postulated that the parties WERE NOT THINKING in terms of political or diplomatic parlance when they employed this particular language.”

“The record does not tell us whether appellee anticipated the necessity of occupying the leased property for a brief time or a long time after the shooting part of the war had ended.”

“However, it is a LOGICAL CONCLUSION that in all PROBABILITY the major part of the merchant marine’s active, wartime functions would have been more LIKELY to have been fulfilled six months after the cessation of open and active fighting * * *.”

“The record makes it apparent that appellee’s local representatives were, in February, 1946, of the view that the lease term had expired * * *.”

“It would have been a very simple matter to so indicate had the parties desired to make this sort of official action the decisive test.”

All, excepting the last quotation from the opinion, is previously covered in this petition for rehearing, but how this Court can hold now that at the time of the lease the home office of appellee had intended that the lease should be measured by official pronouncement of a “temporary” cessation of hostilities, is beyond the comprehension of appellee. This Honorable Court is attempting to decide now what was then in the minds of appellee’s New York office, and to now hold that because they relied upon the lessor, appellant’s own language, that their reliance should be adversely

construed against their requirements⁴ is eminently unjust.

V.

If the Circuit Court of Appeals insists on weighing what they consider the equities and to balance conveniences, which is done where there is a departure from the record, appellee sets forth for review and consideration of the Court that the original premises consisted of an old loft and, "The condition of the building when U.S.S., the defendant corporation, finally decided to lease, was 'horrible'." Transcript of Record, p. 57. The building was remodeled, refurbished and equipped by appellee in the amount of \$30,000.00 to meet its requirements. This expenditure was exclusive of operating expenses and rental and definitely and solely improvements. Appellee receiving its funds from public subscription through the National War Fund, under the trust imposed by the people in the Executive Board of the Fund and the agencies involved, could not countenance the expenditure of \$30,000.00 purely on a "TEMPORARY" proposition. Again repeating that the publicly announced formation, organization and receipt and use

⁴The official records of the United Seamen's Service published jointly and severally with the National War Fund, discloses that for the period from August 14, 1945 to February 14, 1946 the social attendance at its club was 64,463, and from February 15, 1946 to its close, 138,964; that as an adjunct of the club it operated a dormitory and hotel for the seamen who utilized the club facilities for purposes other than sleeping; that the official figures disclose that these operations, during the year 1946, operated at 94% of their capacity—it was not until the spring of 1947 that the attendance and use of the facilities began to gradually drop, finally to the point where termination was indicated.

of such funds was to be utilized for its purpose until it had FINALLY been determined that it was no longer required. United Seamen's Service is the counterpart of the United Service Organizations (USO), and need it be recalled that USO did not cease its operations six months from and after the cessation of hostilities in the present war with Japan, because under the same conditions of cessation and "temporary", USO was needed and did not terminate its national operations until December 31, 1947.

In reciprocity for the improvements made by appellee to appellant's premises, appellant did not avail herself of the provisions of the lease to terminate same by giving the notices required and specified in the lease, but her first step was to attempt to increase the rental from \$400.00 to \$1,000.00 a month.

Need it be stated that IF appellant was of the opinion that the construction and interpretation now being sought was the construction and interpretation to be applied as of the time of the negotiations and execution of the lease, or without a lease the lessor was in a position to file an unlawful detainer action in the State Court.

The complaint in the matter before this Court was not filed until July 2, 1946.

The opinion of the District Court was rendered on August 30, 1946.

Apparently some time thereafter appellant proceeded to accomplish her purpose by the proceedings disclosed by the appendix incorporated herein.

Appellee has noted the statement by the Honorable Court that no authority squarely in point has been cited or discovered. It is not unusual to be unable to cite an authority "squarely" in point. Courts frequently analyze or decide by analogy or similarity and the District Court followed good recognized legal procedure by reasoning by parity. It is most unusual, however, for Courts to decline to reason or decide by analogy, parity, or similarity.

"Under the terms of the agreement when could he demand a lease? He was to be manager 'for a period of time, up to, and until one year after the close of the *present* war.' How was that period to be determined? 'Same to be determined when U. S. ceased to be a party *in* the war, and starts to recall and disband the troops.' It appears that defendant Emil Pokorny intended to enlist for the war, and did enlist, and the purpose of carrying on the hotel under the management of plaintiff, not only until one year after the United States ceased to be party in the war, but as well started to recall and disband the troops, is apparent.

"The close of the war, standing alone, would undoubtedly mean the date when a treaty of peace would be binding on the belligerents. Now, do the added words import any shortening of that period? We must conclude that such words contemplated a possible peace to be followed by a recall and disbandment of the troops. In fact, however, just the opposite, in part, happened. Troops were recalled following the armistice and disbanded, but some troops are still in Europe, and the United States did not end the war with

Germany until the senate ratified the peace treaty on October 19, 1921, and ratifications thereof were exchanged in Berlin on November 11th, and the President of the United States proclaimed peace on November 12, 1921."

"The question of when the war closed is not a judicial one but one to be determined by the political department of the government. *Conley v. Supervisors of Calhoun County*, 2 W. Va. 416."

"We said in *Kneeland-Bigelow Co. v. Railroad Co.*, 207 Mich. 546, that: 'War having been declared, that condition must be recognized by the courts as existent until the duly constituted national power of the country officially declares to the contrary, even though actual warfare has long since ceased.' "

"The parties themselves *have not* delineated or indicated in the contract the essentials necessary to enable the court to carry into execution the things to be performed. We must, therefore, hold that the plaintiff is not entitled to have specific performance of the contract."

Palmer v. Pokorny, 217 Mich. Rep. 284-288-289-292.

Reference is heretofore made in this petition that appellee would hereafter refer to the use of the word "in".

It is of interest that in the *Palmer v. Pokorny* case, *supra*, that in the phrase, "same to be determined when the United States ceased to be a party IN the war", the emphasis placed by the Honorable Court on the word "in" is comparable to the use of the

word "in" by the Michigan Court in the *Palmer* case. It cannot be overlooked that the Michigan Court did not attempt to construe or place any such significance in the use of the word "in" in that case in relation to this Court's observation of the word "in" in this litigation.

VI.

It is an elementary rule of interpretation announced so frequently by the Ninth Circuit Court of Appeals that it is not deemed necessary, at this time, to furnish citations, that an Appellate Court uniformly and consistently takes language of a contract without assumption of fact on its part, and views such language in the light of the events which surround the litigants in so far as such acts aid in interpreting the effect of the written word.

Does the Court now in effect take the position that the situation in the instant case is now different, or that there has been a complete termination of merchant marine activities within the language of the contract, as of the end of the six months period which would be February 14, 1946, and that therefore, the contract is concluded by its own terms?

It is a fundamental rule that the Appellate Court will accept or adhere to the interpretation of the trial Court and not substitute another of its own, though it be tenable, where conflicting inferences may be drawn from the language used.

Surely the Circuit Court does not hold that the District Court abused its discretion in construing and

interpreting the words involved as reflected in its judgment—apparently it is conceded by the Circuit Court that at least conflicting inferences may be drawn.

Appellee desires to call the Court's attention that:

“In California the words of a contract will be taken most strongly against the party who employs them.”

Sec. 1654 C.C.C.

“It would do no good to go over the arguments advanced by *Flotation* in support of its own interpretation of the writing. Enough to say that the arguments are not sufficiently persuasive to warrant our upsetting the interpretation given the contract by the trial court.”

Flotation v. Pollia, 136 Fed. Rep. (2d) 483-484.

It is interesting to note that Judge Matthews participated in the *Flotation* judgment.

While the *Flotation* case maintains that there was considerable evidence on a contemporary construction of the agreement between the parties themselves, and while it may be argued that there is no evidence in the instant case, and for that reason the case is not in point, this may not be conceded by appellee, as the Court in the *Flotation* case held that the California ruling required that the words of a contract be taken most strongly against the party who employed them. This rule has been made the subject of a statute—Section 1654, California Civil Code. In addition

to that the *Flotation* case cites the authority set forth in the brief by the appellee which is the leading case in the State upon the subject and has never been modified or reversed, and which is set forth at length in the brief of the appellee, *Glenn v. Bacon*, 86 Cal. App. 58-72 (3).

It is respectfully submitted that justice will be done and no harm encountered by the granting of a petition for a rehearing.

Dated, San Francisco, California,
February 9, 1948.

J. J. DOYLE,
*Attorney for Appellee
and Petitioner.*

(Appendix Follows.)

Appendix.

Appendix

THEODORE M. MONELL

Attorney at Law

Mills Building

San Francisco 4

Telephone DOuglas 5324

To UNITED SEAMEN'S SERVICE, INC.

437-9 Market Street,

San Francisco, California.

You are hereby notified that the rental for the premises occupied by you at the above address is hereby raised to the sum of one thousand (1,000.00) dollars per month, and that from and after January 13, 1947 your rental for the above premises will be the sum of one thousand (1,000.00) dollars per month, payable in advance, commencing on said January 13, 1947.

The premises above referred to are located in San Francisco and described as follows:

All of that certain store, together with the basement thereunder, in the one and part three-story brick building, situate on the Southeasterly line of Market Street, between First and Fremont Streets, generally known as #439 Market Street. TOGETHER with the entire second and third floors of said building, the entrance thereto being generally known as #437 Market Street.

which premises you have been occupying as a tenant from month to month since the expiration of your lease covering same.

Dated, December 11, 1946.

B. Samuels, Owner,
By Theodore M. Monell,
Attorney.

THEODORE M. MONELL

Attorney at Law
Mills Building
San Francisco 4

Telephone DOuglas 5324.

January 16, 1947.

UNITED SEAMEN'S SERVICE, INC.

437-9 Market Street,
San Francisco, California.

DEMAND IS HEREBY MADE UPON YOU for payment WITHIN THREE DAYS after service upon you of this notice, of the sum of \$1,167.74, being unpaid rental due from you for the premises hereinafter described, being rental in the sum of \$167.74 for the period from January 1, 1947 to January 13, 1947, inclusive, at the rate of \$400.00 per month, and the sum of \$1,000.00 for rental for the month commencing January 13, 1947, in accordance with notice heretofore served upon you, or for possession of said premises which you have been occupying as a tenant

from month to month since the expiration of your lease covering said premises.

In the event of your nonpayment of said rental within said period of three days, you are hereby directed to surrender possession of said premises to Milton Meyer & Co., my agent, who is hereby authorized to accept such possession. In the event of your failure to deliver such possession or make said payment of said rental, action in unlawful detainer will be commenced against you to recover such possession.

The premises hereinabove referred to are located in San Francisco and described as follows:

All of that certain store, together with the basement thereunder, in the one and part three-story brick building, situate on the Southeasterly line of Market Street, between First and Fremont Streets, generally known as #439 Market Street. TOGETHER with the entire second and third floors of said building, the entrance thereto being generally known as #437 Market Street.

B. Samuels, Owner,

By Theodore M. Monell,
Attorney.

and was then followed by the institution of the hereinafter set forth litigation:

THEODORE M. MONELL

1085-7 Mills Building,
San Francisco 4, California,
Telephone: DOuglas 5324.

Filed January 22, 1947,

H. A. van der Zee, Clerk,
By Jas. F. Madden, Deputy Clerk.

In the Superior Court of the State of California,
in and for the City and County
of San Francisco

No. 361632

B. Samuels,

Plaintiff,

vs.

United Seamen's Service, Inc., a non-
profit organization,

Defendant.

COMPLAINT IN UNLAWFUL DETAINER

Comes now the plaintiff above named, and complaining of defendant above named for cause of action alleges the following:

I.

That at all times herein mentioned defendant above named was and now is a non-profit organization incorporated under the laws of the State of New York authorized to do and doing and transacting business

in the State of California and in the City and County of San Francisco in said State.

II.

That at all times herein mentioned plaintiff above named was and now is the owner of that certain building generally known, numbered and designated as 437-9 Market Street in San Francisco.

III.

That on or about September 15, 1943, plaintiff above named by written lease leased to said defendant above named all of that certain store, together with the basement space thereunder, generally known as 439 Market Street, together with the entire second and third floors of said building, the entrance thereto being generally known as 437 Market Street in San Francisco, being the premises hereinbefore mentioned.

That by the terms and provisions of said lease it was therein provided that the term thereof should commence on the 15th day of September, 1943, and extend for a period of six months from and after the cessation of hostilities in the present war with Japan.

IV.

That the term of said lease expired on or about six months after August 14, 1945, being on February 14, 1946 and being six months after V-J Day, at which time hostilities in the present war with Japan ceased.

V.

That in and by the terms and provisions of said lease it is therein provided that any holding over after the expiration of said term, with the consent of the lessor, should be construed to be a tenancy from month to month and should otherwise be on the terms and conditions of said lease so far as applicable.

VI.

That on or about December 11, 1946 plaintiff served upon defendant herein in San Francisco a notice increasing the rental of said premises from the sum of \$400.00 per month to the sum of \$1,000.00 per month, commencing on January 13, 1947.

VII.

That defendant herein has failed to pay the rental for said premises in accordance with the terms of said lease and said notice aforesaid increasing the rental, and there is now due, owing and unpaid from said defendant on account of said rental the sum of \$1167.74, being the sum of \$167.74 for the period from January 1, 1947 to January 13, 1947, inclusive, at the rate of \$400.00 per month, and the sum of \$1,000.00 for rental for the month commencing January 13, 1947.

VIII.

That on or about January 16, 1947 plaintiff herein served upon defendant herein a three-day notice demanding the payment of said sum of \$1167.74 rental

due as hereinbefore alleged, or the surrender of possession of said premises within three days after service of said notice upon said defendant. That defendant herein failed and refused to pay said rental aforesaid or to surrender possession of said premises.

IX.

That by reason of the foregoing, defendant herein is unlawfully holding possession of said premises, against the will and consent of plaintiff herein, to the damage of plaintiff herein in the sum of \$1167.74, being in the amount of said rental aforesaid, and at the rate of \$1,000.00 per month in addition for the period commencing February 13, 1947.

X.

That it is provided in and by the terms and provisions of said lease that in case suit shall be brought for an unlawful detainer of said premises or for the recovery of any rental due under the terms of said lease, that the lessee will pay to the lessor a reasonable fee which shall be fixed by the Judge of the Court as part of the costs of such suit. That a reasonable fee to be allowed herein is the sum of \$300.00.

WHEREFORE, plaintiff prays for judgment of this Court, for restitution of the premises, being all of that certain store, together with the basement thereunder, and the one and part three-story brick building generally known as 437-9 Market Street, together with the entire second and third floors of said building, and for damages in the sum of \$1167.74 as

hereinbefore alleged, and for additional damages at the rate of \$1,000.00 per month for the period during which said defendant may remain in possession of said premises, and for attorney's fees in the sum of \$300.00, and for her costs of suit herein incurred, and for such other and further relief as may be meet and proper in the premises.

Theodore M. Monell,
Attorney for Plaintiff.

State of California,
City and County of San Francisco.—ss.

B. SAMUELS, being first duly sworn, deposes and says:

That she is the plaintiff named in the foregoing complaint; that she has read said complaint and knows the contents thereof, and that the same is true of her knowledge, excepting as to the matters therein stated on information or belief, and as to those matters she believes it to be true.

B. Samuels.

Subscribed and sworn to before me this 22nd day of January, 1947.

(SEAL) Dorothy H. McLennan,
Notary Public in and for the City and
County of San Francisco, State of
California.

The annexed instrument is a correct copy of the original on file in my office.

Attest: Certified January 28, 1948.

Martin Mongan, County Clerk of
San Francisco, and ex-officio
clerk of the Superior Court of
State of California, in and for
the City and County of San
Francisco,

By T. J. Duffy, Deputy.

It is submitted that appellant's actions as evidenced by the two notices and the complaint in unlawful detainer, in the State Court, do not support her position that "plaintiff and defendant intended."

Defendant in the State Court, by appropriate action, moved to stay the proceedings and the hereinafter order staying proceedings made, filed and entered.

J. J. Doyle,
519 California Street,
San Francisco 4, California,
GARfield 3468,
Attorney for Defendant.

Filed April 22, 1947,
Robert Munson, Clerk,
By J. L. Perusio, Deputy Clerk.

The annexed instrument is a correct copy of the original on file in my office.

Attest: Certified January 28, 1948.

Martin Mongan, County Clerk of
San Francisco, and ex-Officio
Clerk of the Superior Court of
the State of California, in and
for the City and County of San
Francisco.

By T. J. Duffy, Deputy.

In the Superior Court of the State of California,
in and for the City and County of
San Francisco

No. 361632

B. Samuels,

Plaintiff,

vs.

United Seamen's Service, Inc., a non-
profit organization,

Defendant.

ORDER STAYING PROCEEDINGS

The motion of defendant for an order staying proceedings coming on regularly to be heard and it appearing to the Court that plaintiff on the 17th day of June, 1946, filed an action, "In the Superior Court of the State of California, in and for the City and County of San Francisco", entitled, "B. Samuels, Plaintiff, vs. United Seamen's Service, Inc., a non-profit organization, Defendant", number 354446, reading, "Complaint for Declaratory Relief", and that said action was transferred to and tried "In the District Court of the United States for the Northern District of California, Southern Division" and judgment therein was, on the 23rd day of December, 1946, entered in favor of said defendant; and it further appearing that on the 22nd day of March, 1947, plaintiff filed an appeal from the said judgment to the Circuit Court of the United States for this District; and it

further appearing that in said referred to litigation and in this suit, that the parties thereto are identical and the subject matter, likewise identical involving the construction and interpretation of the words, "cessation of hostilities", and/or the duties and rights of the parties arising out of and from the construction and interpretation of said words, particularly in the present suit as this Court must necessarily first construe and interpret the legal meaning and effect of "cessation of hostilities" prior to there being any adjudication of unlawful detainer in this suit by this Court; and it further appearing that the final decision of the said Circuit Court on said judgment of necessity, will either affirm, modify or reverse the construction and interpretation of the words, "cessation of hostilities" as used in that certain lease between the parties hereto, and the judgment therein; and it further appearing that the final determination of said appeal will establish the rights of the parties thereto and herein; and

GOOD CAUSE APPEARING, it is hereby ordered that the proceedings herein be stayed pending a final decision on said appeal as to the construction, interpretation and meaning of "cessation of hostilities."

Dated this 22nd day of April, 1947.

Herbert C. Kaufman,
Judge of the Superior Court.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 9, 1948.

J. J. DOYLE,
*Of Counsel for Appellee
and Petitioner.*

